Supreme Court, U.S.
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No. 98-1506

In The

Supreme Court of the United States

October Term, 1998

DONALD D. BARRY, ESQ., et al.,

Petitioners,

vs.

McSHARES, INC., d/b/a RESEARCH PRODUCTS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Court's exclusive jurisdiction over Federal antitrust actions preempts collateral State attacks on the Federal Courts' decisions, rulings and procedures through subsequent State causes of action for malicious prosecution or abuse of process when, in cases where the Federal Court has exclusive jurisdiction and no pendent claims are present, Federal Rule 11 provides a full, complete and sole remedy for allegations that the Federal antitrust claim lacked probable cause and was allegedly brought with improper purpose especially where, in the antitrust action, the Federal District Court Judge overruled Motions to Dismiss, Motions for Summary Judgment and Motions for Directed Verdict.

LISTING OF PARTIES TO THE PROCEEDING

Parties to the proceeding in the Supreme Court of Kansas were:

Plaintiff/ Appellant:	McShares, Inc., d/b/a Research Products
Defendants/ Appellees:	Donald D. Barry, Esq. and Anthony S. Barry, Esq.; Barrack, Rodos & Bacine, a General Partnership, P.C.; Leonard Barrack, P.C.; Gerald J. Rodos, P.C.; Daniel E. Bacine, P.C.; Anthony J. Bolognese; David H. Weinstein, Esq.; Kohn, Swift & Graf, P.C.; Joseph C. Kohn, Esq. and Steven A. Asher, Esq.

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PETITION FOR WRIT OF CERTIORARI

Donald D. Barry, Esq. and Anthony S. Barry, Esq. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered in this proceeding on December 18, 1998, in order to resolve an important issue of Federal preemption as presented herein.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas that gives rise to this Petition appears at *McShares v. Barry*, 970 P.2d 1005 (Kan. 1998) and is reprinted in Appendix A hereto at page App. 1. The findings and conclusions of the Kansas District Court are set forth in Appendix B at page App. 27.

JURISDICTION

On December 18, 1998, the Supreme Court of the State of Kansas issued an opinion reversing the decision of the Saline County District Court and held that the State Court had jurisdiction and was not preempted from entertaining a State malicious prosecution and abuse of process case against certain attorneys who had represented Plaintiffs in a case where only Federal antitrust issues were involved. The Kansas District Court had determined that it lacked jurisdiction as the State case was preempted by Federal law. (App. 32).

In the Federal antitrust case, the Federal District Court denied Motions to Dismiss, Motions for Summary Judgment and Motions for Directed Verdict and submitted the case to a jury. Although McShares wrote three separate Rule 11 letters in the Federal antitrust action, no Rule 11 motion was ever filed. One letter was copied to the Federal District Court Judge.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

U.S. Constitution, Art. I, § 8, cl. 3

> The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with Indian tribes;. . . .

U.S. Constitution, Art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Sherman Act, 15 U.S.C. § 4

> The several District Courts of the United States are invested with jurisdiction to prevent and restrain the violations of §§ 1-7 of this title;. . . .

28 U.S.C. § 1337

The District Courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: . . .

Clayton Act, 15 U.S.C. § 15

(a) Amount of recovery, prejudgment interest

Except as provided in Subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorneys' fee. . . .

Rule 11(b)

By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances –

(1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase of costs of litigation;

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the

extension, modification, or reversal of existing law with the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and. . . .

STATEMENT OF THE CASE

The Underlying Federal Antitrust Action

In November and December of 1993, seven separate class action complaints, each alleging *only* Federal antitrust violations, were filed by separate plaintiffs against various companies involved in the aluminum phosphide industry. One of the complaints named McShares as an antitrust defendant. Another complaint was later amended to add McShares as an antitrust defendant. The Federal District Court consolidated the individual class action complaints and appointed lead counsel, liaison counsel and a steering committee. Subsequently, a single consolidated class action complaint was filed. An amended consolidated class action complaint was filed approximately nine months later. This amended consolidated class action complaint, like all the previous complaints, alleged only Federal antitrust violations under the Sherman and Clayton Acts.

In the underlying Federal antitrust action, McShares sent three separate Rule 11 letters, even sending a copy of one Rule 11 letter to the Federal District Court Judge, but did not file a Motion for Rule 11 sanctions. McShares also

filed Motions to Dismiss, for Summary Judgment and for Directed Verdict. The Federal District Court denied these Motions. The cause was submitted to a jury. The jury returned a verdict in favor of McShares and the remaining antitrust defendants.

State Malicious Prosecution/Abuse of Process Case

McShares filed the present suit in Kansas State Court against a selected few of the approximately 28 attorneys who had appeared on behalf of the various antitrust Plaintiffs. The McShares' suit alleged malicious prosecution and abuse of process against these attorneys for filing the Federal antitrust Complaint against McShares. The matter was removed to Federal District Court where certain dispositive motions were filed, including one based on Federal preemption. The Federal District Court remanded the matter because all defendants failed to timely consent to removal.

State District Court Found Preemption

The State District Court entered its Order dismissing the matter on the basis that, as Congress had vested exclusive jurisdiction over Federal antitrust actions in the Federal Courts, State Courts were preempted from determining issues, such as probable cause, arising solely out of the Federal antitrust actions, and therefore, Federal Rule 11 was McShares' exclusive remedy, and the subsequent State malicious prosecution and abuse of process actions were preempted. (App. 27-32).

Kansas Supreme Court Reversed

The Supreme Court of Kansas reversed the dismissal and held that Federal Courts' jurisdiction over Federal antitrust actions did not preempt subsequent State actions alleging malicious prosecution or abuse of process. (App. 26). The Kansas Supreme Court held that antitrust law was different from bankruptcy because, "the Constitution grants Congress plenary powers over bankruptcies. . . . " (App. 15).

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court Has Usurped Exclusive Federal Authority by Determining a State Court Can Re-evaluate a Federal Court's Determinations of Probable Cause and Propriety of a Federal Antitrust Case, in a State Malicious Prosecution and Abuse of Process Case Filed Against Certain Attorneys Who Represented Several Antitrust Plaintiffs in a Federal Antitrust Suit that Terminated in a Jury Verdict; in that Federal Courts Enjoy Exclusive Jurisdiction Over Federal Antitrust Cases and Federal Courts Make the Exclusive Determination of Whether a Federal Antitrust Case Is Properly Brought or Maintained and as Federal Rule 11, in Actions Solely Involving Exclusive Federal Jurisdiction, Preempts Any State Attempts to Subsequently Make Determinations of Probable Cause or Improper Purpose in Regards to the Filing or Continuing of a Federal Antitrust Action.

Exclusive Federal Jurisdiction

Where Federal Courts have exclusive jurisdiction and determine a Federal antitrust action can be submitted to a

jury, the use of State Courts to attack determinations of probable cause through malicious prosecution suits are preempted, and Rule 11 is the sole remedy for such allegations. Permitting such State attacks on exclusive Federal matters undermines the Federal determinations and supremacy. Claims arising solely under Federal antitrust law fall under the exclusive jurisdiction of Federal Courts and any claim solely based on that Federal antitrust claim must be considered to have arisen under Federal law.

The Constitution of the United States granted Congress the authority to regulate commerce among the several states and with foreign nations. U.S. CONST., Art. I, § 8, cl. 3. The Sherman Antitrust Act, 15 U.S.C. § 4 and the Clayton Act, 15 U.S.C. § 15, confer exclusive jurisdiction on the Federal Courts to prevent and restrain such violations. *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920).[1] State Courts may not grant affirmative relief based on a claim for which Federal jurisdiction is exclusive. *Andrea Theaters*, 787 F.2d at 62.

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[1] See also *General Inv. Corp. v. Lakeshore Ry.*, 260 U.S. 261, 287 (1922); *Andrea Theaters, Inc. v. Theater Confections, Inc.*, 787 F.2d 59, 62 (2nd Cir. 1986); *Miller v. Granados*, 529 F.2d 393, 395 (5th Cir. 1976); *North Carolina Chiropractic Ass'n v. Aetna*, 89 N.C. App. 1, 4, 365 S.E.2d 312, 313 (1988); *Pennsylvania Automotive Association v. Commonwealth of Pennsylvania*, 121 Pa. Cmwlth. 352, 550 A.2d 1041, 1044 (1988); *Nogales Serv. Ctr. v. Atlantic Richfield Co.*, 119 Ariz. 552, 554, 582 P.2d 642 (Az. App. 1978).

Matters involving Federal antitrust laws, whether raised by way of attack or defense, are beyond the jurisdiction of State Courts. *Armstrong v. Taco Time International, Inc.*, 30 Wash. App. 538, 547, 635 P.2d 1114 (1981); *Castrol, Inc. v. Parm Trading Co. of N.Y.C., Inc.*, 645 N.Y.S.2d 825, 228 A.D.2d 633 (1996); *Vaughn & Co., Ltd. v. Saul*, 143 Ga. App. 74, 85, 237 S.E.2d 622 (1977).

The antitrust laws derive their authority from the power of Congress to regulate commerce among the states. *Blumenstock Bros.*, 252 U.S. at 441; U.S. CONST., Art. I, § 8, cl. 3. These antitrust laws are uniquely Federal in that they pertain to issues of national commerce and are enacted for the protection of competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 418 (1977). The essential element for jurisdiction in the Sherman Act is that the challenged activity occurs in the flow of interstate commerce or substantially affects interstate commerce. *Anesthesia Advantage, Inc. v. Metz Group*, 912 F.2d 397, 400 (10th Cir. 1990).

"The antitrust laws were enacted for the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Brunswick*, 429 U.S. at 488. Private suits are merely a vehicle intended to further enforce the antitrust laws for the benefit of the real party in interest, the public. *Jewel T Co., Inc. v. Local Unions*, 274 F.2d 217, 223 (1960).

The Kansas Supreme Court acknowledged that the Sherman Act confers jurisdiction on Federal Courts to prevent and restrain violations of Sections 1 to 7 and that the jurisdiction was exclusive. (App. 15); *Blumenstock*, 252

U.S. at 440. It nevertheless determined that Federal antitrust laws were distinct and different from bankruptcy laws. (App. 15). The Kansas Supreme Court conceded that subsequent State malicious prosecution actions arising out of bankruptcy would be preempted. (App. 15). The Kansas Supreme Court determined that the Federal antitrust laws would not preclude a subsequent State claim based solely on the filing and prosecution of a Federal antitrust action. (App. 23).

Preemption

The Doctrine of Federal Preemption is founded on the Supremacy Clause of the U.S. CONSTITUTION, Article VI, cl. 2. *M.S.R. Exploration Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 913 (9th Cir. 1996), citing *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152-53 (1982).

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; all the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., Art. VI, cl. 2.

Any State law that conflicts with a Federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

> Once an area of State law has been completely pre-empted, any claim purportedly based on that pre-empted State law is considered, from its inception a Federal claim, and therefore arises under Federal law.

M.S.R. Exploration, 74 F.3d at 912. "[P]re-emption and jurisdiction are to that extent inexorably intertwined." *Id.*

In deciding whether Federal law preempts, the task is to ascertain Congressional intent in enacting the Federal statute at issue. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985). The purpose of Congress is the ultimate touchstone of preemption analysis. *Cipollone*, 505 U.S. at 516. Congress' intent may be explicitly stated or implicitly contained in the structure and purpose. *Id.*; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Congressional intent may also be revealed through its clear but implicit preemptive purpose. *De La Cuesta*, 458 U.S. 141, 152-53 (1982).

Preemption is compelled when our Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *M.S.R. Exploration*, 74 F.3d at 912. Absent explicit preemptive language, Congress' intent to supersede State law altogether may be inferred because "[t]he scheme of Federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* It may also be inferred because the act of Congress may touch a field in which the Federal interest "is so dominant that the Federal system will be assumed to preclude enforcement of State laws on the same subject." *Id.* When there is a conflict between Federal and State law, where the State law in its application may contravene Federal public policy or cause a different result or consequence, preemption will exist. Preemption occurs if the State law actually conflicts with Federal law or if Federal law so thoroughly occupies a field as to leave the inference that Congress left no room for the

State to supplement it. *Cipollone*, 505 U.S. at 516. In making a preemptive determination a Court should examine those concerns emphasized by Congress in enacting the Federal legislation. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984). Preemption exists where there is a conflict between the Federal and State law, where the State law in its application may contravene Federal public policy or cause a different result or consequence. *Elkins v. Showcase, Inc.*, 237 Kan. 720, 727, 704 P.2d 977 (1985). Preemption exists when State law conflicts with Federal law, that is when compliance with both State and Federal law is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Preemption also exists when the State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Federal Law Controls Determination of Probable Cause

Federal law controls the determination as to whether an antitrust action was properly commenced. *Fagan v. Sunbeam Lighting Co., Inc.*, 303 F. Supp. 356, 358 (S.D. Ill. 1969). A Federal Court can best balance the Congressional intent and can best understand the difficulty an antitrust plaintiff has in investigating prior to filing. "The difficulty of investigating the conspiracy and monopolization claims prior to the initiation of the lawsuits lessens the extent of investigative efforts that an attorney must undertake to satisfy the reasonable inquiry standard." *Capital Imaging Ass'n v. Mohawk Valley*, 725 F.Supp. 669, 681 (S.D.N.Y. 1989).

The determination of whether or not the Federal antitrust case was supported by sufficient probable cause or was not filed for an improper purpose lies exclusively within the jurisdiction of the Federal District Court. As Congress has granted to the Federal Courts exclusive jurisdiction over Federal antitrust actions, it is for the Federal Courts alone to determine when an action is properly brought. If the Federal antitrust action is brought without sufficient probable cause, it is the District Court Judge who has been assigned the case that must make this determination. Rule 11 stands as the mechanism whereby a Federal Judge can, through sanctions, compensate an antitrust defendant for his damages, including attorneys' fees, in the event that the District Court Judge determines that the Federal antitrust action was filed without sufficient probable cause and for an improper purpose. Rule 11(c)(2).

Where a District Court has considered the basis of the claim in denying motions for dismissal, summary judgment and directed verdict, and has in fact submitted the cause to the jury, it has determined probable cause issues, and permitting a State Court to re-evaluate the probable cause basis of the solely Federal antitrust case would allow the State Court to second-guess the Federal Court's determination within its exclusive province and would permit the State Court to collaterally attack the decisions and determinations of the Federal District Court Judge in an area of exclusive Federal jurisdiction.

Permitting a State "review" of the basis of a Federal antitrust case conflicts with Congressional purposes and could become an obstacle to Congress' intent to encourage civil antitrust claims. For this reason, this Honorable

Court must review this matter to establish that strictly Federal antitrust claims are not subject to State malicious prosecution or abuse of process lawsuits. This Court must issue its Writ of Certiorari to take this case and establish that in areas of exclusive Federal jurisdiction, Rule 11, and the appropriate dispositive motions available in Federal Court, preempt any such subsequent State action for malicious prosecution or abuse of process.

Rule 11 Preempts Only In Cases of Exclusive Jurisdiction

Rule 11 functions as part of preemption of State malicious prosecution or abuse of process claims only in those cases where the sole claim before the Federal Court is one in which the Federal Court enjoys exclusive Federal jurisdiction. This is an important distinction that must be clarified by this Court. In cases where the Federal Court has pendent jurisdiction over a State claim or has before it a claim to which the Court does not enjoy exclusive jurisdiction, Rule 11 preemption of a subsequent State action would not apply.[2]

The right to bring a private Federal antitrust action was created purely by an Act of Congress. Therefore, prior to such Congressional enactment, there did not exist

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[2] This case is distinct from cases also involving pendent state claims. In such cases the exclusivity would not be present and Rule 11 would not preempt. See, i.e., *Business Guides, Inc. v. Chromatic Comm. Ent., Inc.*, 498 U.S. 533 (1991); *Cohen v. Lupo*, 927 F.2d 363 (8th Cir. 1991); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993). These three distinguishable cases were relied on by the Kansas Supreme Court. (App. 31).

any common law right to bring any action based on that Federal cause of action. Precluding the Federal antitrust defendant from bringing a State malicious prosecution or abuse of process action, *based on the filing* or continuation of the Federal antitrust action, does not limit or remove a right ever possessed under State law prior to the Federal enactment. Therefore, Congress did not eliminate a prior State right, but merely precluded any subsequent State actions based on that Federal claim to which Federal Courts were given exclusive jurisdiction.[3]

Congressional Incentives

In the creation of the Federal Antitrust Laws, Congress provided incentives to make antitrust laws more effective in protecting free and open competition.

> [I]t can be postulated with some certainty that it is not the policy of our national antitrust laws to discourage private treble damage actions such as this, to the contrary, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act . . . in the face of such a policy, this court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.

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[3] Thus there is no conflict with the dicta in *Business Guides* that Rule 11 is not a Federal tort of malicious prosecution. For Federal claims that fall exclusively within Federal purview, dispositive motions and Rule 11 are the only recourse if one claims a lack of probable cause. If Federal claims are not exclusive or if pendent State claims are present, subsequent State actions are not preempted.

Leh v. General Petroleum Corp., 165 F. Supp. 933, 937 (D.C.S.D. Cal. 1958).

The antitrust laws permit successful antitrust plaintiffs attorneys' fees but do not permit successful antitrust defendants attorneys' fees *except via the specifically provided mechanism of Rule 11.* Permitting State malicious prosecution or abuse of process action by successful antitrust defendants would permit them to seek what Congress did not provide them, attorneys' fees. It is a huge disincentive to private litigants and their attorneys to permit an expensive and time consuming State action against Federal antitrust plaintiffs or their counsel seeking damages and attorneys' fees against Federal antitrust plaintiffs or their attorneys who could have otherwise survived Rule 11 motions in the original Federal action. Because any Rule 11 motion would be a part of the underlying antitrust action, there would not be an extensive additional expenditure of time or money in defending the Rule 11 motion. Also contrary to Congress' exclusive grant of the matter to Federal Courts, State Courts would be asked to make determinations of probable cause or improper purpose in an area where Congress has a great interest in encouraging private antitrust litigation and has placed its exclusive jurisdiction with the Federal Courts.

Dispositive motions and Rule 11 provide adequate protection from allegedly frivolous lawsuits without undermining the Congressional intent of providing strong incentives to bring private antitrust actions. "[I]n the absence of specific legislative authorization, attorneys' fees may not be awarded to defendants in private antitrust litigation. Our conclusion is based on policy

considerations reflected in the Clayton Act." *Byram Concretanks, Inc. v. Warren Concrete Products Co. of N.J.*, 374 F.2d 649, 651 (3rd Cir. 1966).

> [I]t is well known that if a primary objective of the private treble damage suit is to provide a means for enforcement of the antitrust laws in addition to Government prosecutions. The incentive which the prospect of treble damages provides for instituting private antitrust actions would be dampened by the threat of assessment of a defendant's attorneys' fees and other costs as a penalty for failure.

Id. The only authorization for attorneys' fees for antitrust defendants would be as permitted under Rule 11.

Rule 11 Is Sole Remedy for Areas of Exclusive Jurisdiction

Rule 11 of the Federal Rules of Civil Procedure is the remedy provided in the Federal system when a matter has allegedly been brought frivolously, for an improper purpose or if the allegations lack support. Fed.R.Civ.P. 11(b). The Federal Court, in considering Rule 11 sanctions, and with its familiarity with the case and the Federal antitrust probable cause standards, possesses the authority to award all or some of the reasonable attorneys' fees and other expenses incurred as a direct result of any violation. Fed.R.Civ.P. 11(c)(2).

Rule 11 is the only such remedy provided for all such alleged abuses in all cases brought before the Federal Courts. In cases where the Federal Court has before it matters of concurrent or pendent jurisdiction or actions in

which the Federal Court does not possess exclusive jurisdiction, Rule 11 is available but does not preempt other remedies, such as State remedies of malicious prosecution or abuse of process. However, in areas of exclusive Federal jurisdiction, Rule 11, alone or with other Federal rules or statutes that may be part of a specific Federal enactment,[4] preempts any State claim for malicious prosecution or abuse of process. This Court must clarify this by granting certiorari in this matter.

Various Courts have examined the issue of whether Rule 11 preempts State claims of malicious prosecution or abuse of process where there is exclusive jurisdiction of the underlying claim. The majority of these cases are in the area of bankruptcy or civil rights violation.[5] *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987), held that State Courts are not authorized to determine whether a person's claim for relief under Federal law, in a Federal Court, within that Court's exclusive jurisdiction is an appropriate one.[6] *Id.* at 1035. Such an exercise of authority

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[4] For example Bankruptcy Rule 9011, which is "substantially equivalent" to Rule 11, works in conjunction with Rule 11 to provide the basis for preemption. *In re Kouterick*, 167 B.R. 353 (Bcy. D. N.J. 1994); *Edmunds v. Lawrence Nat. Bank & Trust Co.*, 16 Kan. App. 2d 331, 823 P.2d 219 (1991).

[5] Relevant cases in addition to those discussed are: *Szabo Food Serv. Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987); *Mason v. Smith*, 672 A.2d 705 (N.H. 1996); *Smith v. Mitchell Constr. Co., Inc.*, 481 S.E.2d 558 (Ga. App. 1997); *Sarno v. Thermen*, 608 N.E.2d 11 (Ill. App. 1992).

[6] In contrast, the Kansas Supreme Court relied on three cases where pendent State claims were also asserted. *Business Guides*, 498 U.S. 533; *Cohen*, 927 F.2d 363; and *Lightning Lube*, 4 F.3d 1153.

would be inconsistent with and subvert the exclusive jurisdiction of the Federal Courts by allowing State Courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those Courts from adjudicating. *Id.* The Kansas Supreme Court, in contrast to *Gonzales*, cited *Cohen v. Lupo*, 927 F.2d 363 (8th Cir. 1991).[7]

Several other Courts have determined that, when considering areas of exclusive jurisdiction, subsequent State malicious prosecution or abuse of process actions are preempted. A California Court, *Idell v. Goodman*, 224 Cal App. 3d 262, 273 Cal. Rptr. 605 (1990), held that a malicious prosecution case following a bankruptcy proceeding was preempted by Federal law. The Court explained:

> State Courts are not authorized to determine whether a person's claim for relief under a Federal law, in a Federal Court, and within the Federal Court's exclusive jurisdiction, is an appropriate one. . . . The Congress' grant to the Federal Courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in State Courts is supported by the fact that remedies have been made available

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[7] In *Cohen*, the Federal Court determined the securities fraud claim lacked probative evidence, granted summary judgment and issued Rule 11 sanctions for a portion of the legal fees expended. *Id.* at 364. The 8th Circuit held that the remaining attorney's fees could be sought in a State Court's malicious prosecution action. *Id.* at 365. The decision was based on *res judicata*, not preemption. *Id. Cohen* included pendent State claims. *See Bastien v. R. Rowland & Co.*, 631 F.Supp. 1554, 1557 (E.D. Mo. 1986).

> in the Federal Courts to creditors who believe that a filing is frivolous. Debtors filing bankruptcy petitions are subject to the requirements of good faith . . . , and violations of that requirement can result in the imposition of sanctions. Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties including the kind of substantial damage awards that might be available in State Court tort suits.

Id. at 608-09, internal citations omitted.

The California Court, in analyzing the potential conflicts of Federal law, further stated:

> Even the mere possibility of being sued in State Court could in some instances deter persons from exercising their rights in bankruptcy. In any event, it is for Congress and the Federal Courts, not the State Courts, to decide what incentive and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized.

Id. at 609.

The problem is more than one of State Courts deciding issues of Federal law in one manner or another; the difficulty goes much deeper. *M.S.R.*, 74 F.3d at 914. It is a question of State Courts, in effect, interfering with the whole complex, reticulated process. *Id.*

The Court in *Furillo v. Dana Corp. Parish Div.*, 866 F.Supp. 842 (E.D. Pa. 1994), held that an employee's defamation claim arising out of a labor agreement dispute

was preempted under the Labor and Management Relations Act. The Court reasoned that allowing the State Court to delve into the underlying facts involving the collective bargaining agreement would violate the policy that the Federal Courts develop a uniform body of Federal labor laws. *Id.* at 851. The *Furillo* Court determined that "[a]ny resolution of this case under State tort theory would require the interpretation of the collective bargaining agreement and consequently the determination cannot be made by a State Court." *Id.* at 852. "The possibility of inconsistent results arising from such a double inquiry is precisely the type of situation that the preemption doctrine was meant to address." *Id.*

> Congress has specifically addressed the problem of abusive litigation when it promulgated Rule 11 of the Federal Rules of Civil Procedure. By explicitly delineating what rights a defendant has when an abusive claim based upon Federal law is brought against that party, Congress has simply pre-empted its entire area of law.

East-Bibb Twiggs Neighborhood v. Macon-Bibb Planning & Zoning Comm'n, 674 F. Supp. 1475, 1476-77 (N.D. Ga. 1987).

The *East-Bibb Twiggs* case was a Federal civil rights action. The *East-Bibb Twiggs* Court noted that if State abusive litigation claims were permitted on Federally-created rights, they could have a tremendous "chilling-effect" on the assertion of the Federally-created right. *Id.* at 1477. This logic is especially pertinent in Federal antitrust cases.

In *Great Western Bank v. Southeastern Bank*, 507 S.E.2d 191 (Ga. App. 1998), the Court cited *East-Bibb* favorably

and concluded that the Court of the forum in which the proceeding occurred has the overriding interest in determining questions concerning the sanctions to be imposed for litigation abuses in that proceeding.[8] *Id.*

In Federal antitrust cases, not only does the reasoning of these other Courts apply, but also because the antitrust laws are designed to protect competition, Congress does not want private litigants chilled by potential inconsistent State Court action.

Congress Encourages Private Enforcement

Congress established Federal antitrust laws to protect competition and the free market system. See *Twin Cities Sport Serv. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982). In most cases alleged offenders are powerful entities with vast resources and those bringing the complaints are often entities or individuals without sufficient market influence and often with limited resources. It is in the interest of the public good, of commerce and free competition to encourage private antitrust suits. There would be a huge disincentive to private litigants and their attorneys if powerful entities were permitted to second guess and collaterally attack Federal Court decisions by bringing State claims for malicious prosecution or abuse of process. Permitting such State attacks could deter antitrust plaintiffs and their attorneys from using

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[8] The Kansas Supreme Court relied on a California Appellant Court decision, *Roberto Del Rio v. Anthony Jetton*, 55 Cal. App. 3d 430 (1997). The *Del Rio* case considered only *East-Bibb* and rejected it without setting forth any legal support for its disagreement.

Federal antitrust laws and would subvert and contravene Congressional intent in protecting commerce and free and open competition through aggressive antitrust laws.

In a Federal antitrust case such as the one in question, where McShares wrote three "Rule 11" letters to Defendants but did not serve or file a Motion for Rule 11 sanctions, where the Federal District Court denied motions to dismiss, for summary judgment and for directed verdict and submitted the case to a jury – the State malicious prosecution action and abuse of process claim would be an attack on the Federal Court's determinations and rulings of probable cause in an area of exclusive Federal jurisdiction. Although there is a plethora of probable cause evidence in this case, these Defendants should not be exposed to the expense and distractions required to prevail on showing probable cause where the State Court is not the proper jurisdiction to examine probable cause in a Federal antitrust case.

This Court should issue its Writ of Certiorari, take this case and clearly establish that in cases where the only claim before the Federal Court is one of exclusive Federal jurisdiction, dispositive motions and Rule 11 are the only remedies for allegations of lack of probable cause, and subsequent State attacks are preempted. Determinations of probable cause by the Federal District Court are a vital and integral part of the Federal antitrust action and must be determined only by Federal Courts and not "second guessed" in State Court.

CONCLUSION

This Court should issue its Writ of Certiorari to the Kansas Supreme Court and resolve the question of whether State causes of action, such as malicious prosecution, can be subsequently brought when based solely on an underlying Federal claim in which the Federal Courts have exclusive jurisdiction. Congress' interests in protecting interstate and foreign commerce and competition is at least as compelling as its interest in uniformity in bankruptcy. When a claim is exclusively Federal, preemption is complete, and Rule 11 should be the exclusive remedy. Attacking the claim in a separate State action will require a great expense of time, energy and money relitigating and producing evidence demonstrating the existence of probable cause and the lack of improper purpose. The exact same type of evidence was produced to overcome Motions to Dismiss, for Summary Judgment and Directed Verdict. Permitting such attacks in a subsequent State action undermines the Congressional intent of encouraging antitrust plaintiffs and their attorneys to bring civil actions. If those actions are brought without probable cause, they can be quickly disposed of in Federal Court with any appropriate sanctions assessed through Rule 11. This issue is ripe for determination by this Honorable Court.

Petitioners respectfully request their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 80,527

McSHARES, INC.,
Appellant,

v.

DONALD D. BARRY, *et al.*,
Appellees.

SYLLALBUS BY THE COURT

1.

Absent an express statement by Congress that state law is preempted, preemption occurs where there is an actual conflict between federal and state law, where compliance with both federal and state law is, in effect, physically impossible, where Congress has occupied the entire field of regulation and leaves no room for states to supplement federal law, or when the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

2.

Federal Rule of Civil Procedure 11 is a procedural tool to sanction counsel for frivolous or abusive litigation; it does not exclude the filing of a state action for malicious prosecution and abuse of process arising out of Sherman Antitrust Act, 15 U.S.C. 1 *et seq.* (1994), litigation.

Appeal from Saline district court; DANIEL L. HEBERT, judge. Opinion filed December 18, 1998. Reversed and remanded.

Dianne M. Hansen and *Thomas M. Bradshaw*, of Armstrong, Teasdale, Schlafly & Davis, of Kansas City, Missouri, argued the cause, and *J. Stan Sexton*, of Hampton Royce Engleman & Nelson, of Salina, was with them on the briefs for appellant.

Arlen L. Tanner, of Wallace, Saunders, Austin, Brown & Enochs, Chartered, of Overland Park, argued the cause, and *Norman I. Reichel*, of the same firm, and *Norman R. Kelly*, of Norton, Wasserman, Jones & Kelly, of Salina, were with him on the brief for appellees Donald D. Barry and Anthony S. Barry.

Stephen J. Torline, of Blackwell Sanders Matheny Weary & Lombardi, LLP, of Overland Park, argued the cause, and *James D. Griffin*, of the same firm, was with him on the brief for appellee David H. Weinstein.

Catherine M. Walberg, of Goodell, Stratton, Edmonds & Palmer, L.L.P., of Topeka, argued the cause, and *Wayne T. Stratton*, of the same firm, was with her on the brief for appellees Barrack, Rodos & Bacine, a General Partnership, P.C.; Leonard Barrack, Leonard Barrack, P.C.; Gerald J. Rodos, P.C.; Daniel E. Bacine, P.C.; and Anthony J. Bolognese.

Richard T. Foster and *Robert G. Martin*, of McDonald, Tinker, Skaer, Quinn & Herrington, P.A., of Wichita, were on the brief for appellees Kohn, Swift & Graf, P.C.; Joseph C. Kohn, Esq.; and Steven A. Ashen, Esq.

The opinion of the court was delivered by

ALLEGRUCCI, J.: This is an appeal from the district court's dismissal of the petition of McShares, Inc.,

(McShares) for damages for alleged malicious prosecution and abuse of process. The defendants/appellees are individual attorneys and law firms who represented claimants against McShares in a prior federal court class action under the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* (1994), which concluded with a jury verdict in favor of McShares. The appeal was transferred from the Court of Appeals to this court.

The district court dismissed the petition in the present case on the ground that the subject matter is preempted by operation of federal law and procedure. The sole issue in this appeal is whether the state court claims of malicious prosecution and abuse of process arising out of the Sherman Antitrust Act litigation are preempted by federal law.

Material facts are not in dispute. The district court's journal entry of judgment recites that defendants had filed various motions requesting judgment on the pleadings, dismissal of the action, and summary judgment. The district court had requested the parties to file proposed findings of fact and conclusions of law, and the journal entry of judgment contains findings of fact and conclusions of law. It does not appear that all the district court's findings of fact are from the pleadings. For this reason, the trial court's action will be deemed to be an entry of summary judgment in favor of defendants/appellees and against McShares. K.S.A. 60-212(b) and (c).

There is nothing in the record, docketing statement, or briefs to indicate that any challenges have been or are being raised to the district court's findings of fact. The district court's determinations of fact, therefore, are final

and conclusive. *Justice v. Board of Wyandotte County Comm'rs*, 17 Kan. App. 2d 102, 109, 835 P.2d 692, *rev. denied* 251 Kan. 938 (1992).

The district court's findings of fact are as follows:

"1. On or about November 27, 1996, Plaintiff filed a Petition for damages against the Defendants herein alleging claims for malicious prosecution and abuse of process.

"2. Plaintiff alleges that the Defendants acted without probable cause and with malice, and improperly and for an ulterior purpose and motive in filing against and continued prosecution of Plaintiff in *Albert City Elevator Co. v. Pestcon Sys., Inc., et al.*, Case No 93-CV-2496, in the United States District Court for the District of Kansas.

"3. The Defendants are individual attorneys and law firms who represented the claimants against the Plaintiffs herein in the prior Federal Court action.

"4. The prior Federal Court action against Plaintiff was premised solely upon alleged civil violations of Federal anti-trust laws, specifically the Sherman Anti-Trust Act, 15 U.S.C. § 1, *et seq.*

"5. Without detailing the somewhat convoluted procedural history of the prior Federal Court case, the action consisted of several individual class action lawsuits against various parties filed pursuant to the Federal Rules of Civil Procedure, which cases were eventually consolidated and tried under procedures set forth in the Federal Court Manual for Management of Complex Litigation.

"6. After extensive pre-trial proceedings, the Federal case was tried to a jury which returned, inter alia, a verdict in favor of Plaintiff herein against the claims of the parties represented by the Defendants herein.

"7. No motion or other action was filed by the Plaintiff herein in the prior Federal case suggesting that any pleading filed by any of the Defendants herein was frivolous, unwarranted or filed for any improper purpose."

Summary judgment is appropriate when there is no genuine issue as to any material fact and the movants are entitled to judgment as a matter of law. K.S.A.1997 Supp. 60-256(c). On appeal of a case like the present one where there is no dispute as to the material issues, this court's review of the district court's conclusions of law is unlimited. *Gillespie v. Seymour*, 250 Kan. 123, 129, 823 P.2d 782 (1991).

The district court reasoned that because federal courts have exclusive jurisdiction of Sherman Act antitrust actions, a state court is preempted from entertaining abusive litigation claims arising from an antitrust action. In its conclusions of law, the district court stated that adjudication of McShares' malicious prosecution and abuse of process claims would require resolution of complex issues under the Sherman Act, would create potential for impermissible conflict in interpretation and application of a complex federal act, might obstruct accomplishment and execution of Congress' purposes in enacting the Act, and might have a chilling effect on persons exercising their rights under the Act because a subsequent state court action effectively would constitute

a collateral attack on the federal court proceeding. The district court cited *East-Bibb Twiggs Neighborhood v. Macon-Bibb Plan.*, 674 F.Supp. 1475 (M.D. Ga. 1987), and *Edmonds v. Lawrence Nat'l Bank & Tr. Co.*, 16 Kan. App. 2d 331, 823 P.2d 219 (1991), for the principle that state court remedies are preempted by the combined operation of federal law and procedure. Citing *Edmonds*, the district court declared: "Kansas clearly recognizes that where Congress has preempted a particular field by an award of exclusive jurisdiction, Federal Rule of Civil Procedure No. 11 preempts any state cause of action for abuse of process or malicious prosecution arising out of cases so exclusively reserved." The district court distinguished *Business Guides v. Chromatic Comm.*, 498 U.S. 533, 112 L. Ed. 2d 1140 111 S. Ct. 922 (1991), *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), and *Cohen v. Lupo*, 927 F.2d 363 (8th Cir. 1991).

On appeal, McShares contends that the district court's reliance on *Edmonds* and *East-Bibb Twiggs* was in error. McShares would distinguish Edmonds and the cases cited therein on the ground that the underlying federal action was in bankruptcy. McShares would distinguish *East-Bibb Twiggs* on the ground that the underlying federal action was a civil rights action. Bankruptcy has the double distinction of being a field that is completely occupied by federal law and of containing its own remedy for frivolous or malicious proceedings. Civil rights is a field in which federal and state law operate concurrently, but federal civil rights legislation, unlike the Sherman Act, includes a remedy for frivolous or malicious proceedings.

In *Edmonds*, the district court entered summary judgment in favor of the defendant bank, holding that Fed. R. Civ. Proc. 11 and Fed. R. Bankr. Proc. 9011 preempted any state action for malicious prosecution or abuse of process that arose from the bank's filing of a complaint to revoke the Edmondses' discharge granted by the U.S. Bankruptcy Court. 16 Kan. App. 2d at 331-32. The Court of Appeals affirmed.

The Court of Appeals considered but passed on *East-Bibb Twiggs* and *Cohen*, which had been cited by the Edmondses for the proposition that Rule 11 is a procedural tool that cannot alter or eliminate substantive state law. The court settled on *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987), as a more persuasive federal case. Barbara Parks held a deed of trust, which she sought to foreclose, on the Gonzaleses' real property. The sale was halted when the Gonzaleses filed a petition in bankruptcy. In California state court, Parks filed an action claiming that the bankruptcy filing constituted an abuse of process. The Gonzaleses filed an adversary proceeding in the bankruptcy court against Parks and her counsel, Jerome Parks, seeking relief from the state court action. The bankruptcy court granted summary judgment in favor of the Gonzaleses, and that action was affirmed by the federal district court and the Court of Appeals. 830 F.2d at 1034-35. Our Court of Appeals quoted the following passage from the opinion of the federal Court of Appeals:

> " 'Implicit in the Parkses' appeal is the notion that state courts have subject matter jurisdiction to hear a claim that the filing of a

> bankruptcy petition constitutes an abuse of process. We disagree with that assumption. Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts are not authorized to determine whether a person's claim for relief under federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating. [Citation omitted.] . . . The ability collaterally to attack bankruptcy petitions in state courts would also threaten the uniformity of federal bankruptcy law. . . . ' 830 F.2d at 1035." 16 Kan. App. 2d at 333-34.

Noting that *Gonzales* involved filing of a bankruptcy petition and the Edmondses were complaining of a complaint to revoke their discharge in bankruptcy, the Court of Appeals concluded that the same principles governed both situations. The Court of Appeals also examined a California state court case, *Idell v. Goodman*, 224 Cal. App. 3d 262, 273 Cal. Rptr. 605 (1990). From that case, the Court of Appeals quoted the following: "The *Idell* court stated that 'the reasoning of *Gonzales* bears repeating. The existence of federal sanctions for the filing of a frivolous and malicious bankruptcy pleading must be read as an implicit rejection of state court remedies.' 224 Cal. App. 3d at 271." 16 Kan. App. 2d at 334. Thus persuaded by the reasoning of *Gonzales* and *Idell*, the Court of Appeals concluded that "state court remedies are not available for

seeking redress for allegations of frivolous and malicious bankruptcy actions." 16 Kan. App. 2d at 334.

In 1987, at the time it considered *Gonzales*, the Ninth Circuit court was "able to find only one other case where a state court considered a claim that filing a bankruptcy petition constituted an abuse of process." 830 F.2d at 1035 n.5. The question seems to have arisen several times in the meantime. Since *Edmonds* was decided in 1991, it has been cited with approval by courts in four federal circuits. All are bankruptcy cases.

McShares argues that the principles upon which the Court of Appeals based its decision in *Edmonds* do not extend to nonbankruptcy areas of law. Bankruptcy law is unique to the federal court system, but the states share parallel authority with the federal government in other fields, such as civil rights, antitrust, and securities regulation. In addition, federal bankruptcy law includes sanctions tailored for frivolous and malicious bankruptcy filings. Fed. R. Bankr. Proc. 9011. According to McShares, because federal legislation neither completely occupies the field of antitrust nor provides sanctions specific to it, *Edmonds* is not controlling and remedies for abusive federal antitrust litigation should not be restricted to federal courts.

Like *Edmonds*, *East-Bibb Twiggs* restricts remedies for abusive federal litigation to those available under federal law. In the federal civil rights action under 42 U.S.C. § 1983 (1994), a defendant filed a counterclaim for abusive litigation based on Georgia state law. The federal district court granted plaintiff's motion to dismiss the counterclaim, noting that Congress provided a remedy in

42 U.S.C. § 1988 (1994) for one who has to defend against a frivolous § 1983 action. It further noted that Rule 11 specifically addresses the problem of abusive litigation. "By explicitly delineating what rights a defendant has when an abusive claim based upon federal law is brought against that party, Congress has simply pre-empted this entire area of the law, and accordingly, [Georgia state law] has no application to this case." 674 F. Supp. at 1476-77. The district court stated:

> "Congress' unwillingness to provide specifically for special damages other than litigation costs, damages for mental distress, and nominal damages in any of the statutes designed to deter abusive litigation, indicates to this court that Congress did not believe that such damages should be recoverable in these federal causes of action." 674 F. Supp. at 1477.

McShares would minimize the persuasive force of *East-Bibb Twiggs* in this case. First, McShares asserts that it "is the **only** case outside of the bankruptcy area which has ever held that federal law and federal procedure preempt independent state law claims for abusive litigation which arises from actions based on federal law." Defendants have not contradicted McShares' assertion.

We have found one other nonbankruptcy case supporting preemption, and it, like *East-Bibb Twiggs*, is from Georgia. *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 400, ___ S.E.2d ___ (1998). It was decided after the parties submitted their briefs in the present case. In a prior federal court action, Great Western Bank charged an automobile dealership, its owners, and Southeastern Bank with violations of the state and federal racketeering

statutes (RICO). Southeastern Bank's motion to dismiss it from the federal action was granted, and it brought the state court action against Great Western Bank and its attorneys under a Georgia abusive litigation statute. The state trial court denied Great Western Bank's motion to dismiss, which argued the principle that Rule 11 provided the exclusive remedy. On interlocutory appeal, the Court of Appeals of Georgia reversed. It held that the state court action could not be maintained because Southeastern Bank had the remedy of Rule 11 sanctions available in the underlying federal litigation.

The Georgia appellate court's rationale is not very convincing. The decision was based on its perception of the intent of the state legislature in enacting the abusive litigation measure and the intent of Congress with regard to Rule 11 and other federal statutes. In discerning the federal intent, the court examined seven decisions from federal district courts in Georgia. *East-Bibb Twiggs* was among them. All the cases but one involved the Georgia common-law abusive litigation remedy that had been superseded by the abusive litigation statute at issue. According to the Georgia appellate court, only in one case, *Chromatics, Inc. v. Telex Computer Products, Inc.*, 695 F. Supp. 1184 (N.D. Ga. 1988), did the court hold that it had jurisdiction of the abusive litigation claim. From the federal cases embracing the majority rule, the Georgia court seems to have drawn the conclusion that Congress intended Rule 11 to be the exclusive remedy for abusive litigation. From the Georgia court's synopses of the federal courts' holdings, however, only *East-Bibb Twiggs* really supports the conclusion. By the Georgia court's reckoning, in two cases "the courts characterized [the

common-law abusive litigation] claim as a permissive counterclaim under federal law, thereby holding that they were without subject matter jurisdiction of the claim in a non-diversity case." 234 Ga. App. at 423. In two other cases,

> "the courts held that [the common-law abusive litigation] claim may not be raised in federal court even if as a permissive counterclaim it satisfies requirements for diversity jurisdiction, because it is arguably a procedural device which federal courts would not be subject to follow under the Erie doctrine and not a substantive cause of action." 234 Ga. App. at 423.

In another case, the abusive litigation claim was dismissed for failure to give required notice. After reviewing state and federal law for legislative intent, the court finished its opinion by analogizing to an unspecified provision of the Restatement (Second) of the Conflict of Laws that governs relationships between courts of different states: "The court of the forum in which the proceeding occurred has the overriding interest in determining questions concerning the sanctions to be imposed for litigation abuses in that proceeding." 234 Ga. App. at 424.

A California state court has expressly disagreed with the holding of *East-Bibb Twiggs*. In *Del Rio v. Jetton*, 55 Cal. App. 4th 30, 63 Cal. Rptr. 2d 712 (1997), the Court of Appeal reversed a trial court's dismissal of a malicious prosecution action brought by police officers who had been defendants in a federal civil rights action. *East-Bibb Twiggs* was the only case cited to the Court of Appeal on the preemption issue. 55 Cal. App. 4th at 37. With regard to the Georgia case, the California court stated:

> "The fact that Congress has provided certain remedies to a party forced to defend a meritless civil rights claim, or who is subjected to baseless court filings, does not demonstrate an intent to preclude a subsequent state tort action where the claim was not only frivolous or entirely without merit, but also was motivated by actual malice against the defendant. The risk of a 'chilling effect' is limited to those plaintiffs whose intent in filing a civil rights claim is malicious. There is no basis in history or logic to conclude that Congress intended to encourage such claims." 55 Cal. App. 4th at 37-38.

The second reason McShares gives for not applying *East-Bibb Twiggs* is that "civil rights litigants have an exclusive federal law remedy for recovery of attorneys' fees and costs by the prevailing party," 42 U.S.C. § 1988, that is not available to litigants in other areas of federal law, including antitrust. As we have seen, the California court did not even believe that civil rights litigants' remedies should be limited to those provided by the federal statute and rule.

The third reason McShares suggests for downplaying the significance of *East-Bibb Twiggs* is that the remedies provided by Rule 11 have been significantly limited by amendments since *East-Bibb Twiggs*. The case cited by *McShares, Kiser v. Boeing Co.*, 163 F.R.D. 13 (D. Kan. 1995), for the proposition that the 1993 amendments defanged Rule 11, lends little support for that general proposition and is readily distinguishable from the present case. Comparison of Rule 11 before and after the amendments, however, confirms that the breadth of the remedies has been narrowed.

In the present case, the district court's reasoning depends on a precise identity of federal preemption of bankruptcy proceedings and federal jurisdiction of actions brought under a federal antitrust statute. The two are not precisely the same, however, and the difference between them is significant.

Congressional power to preempt state law is derived from the Supremacy Clause of Art. VI of the United States Constitution. In deciding that Congress' enactment of the Communications Act and creation of the Federal Communications Commission had not preempted state regulation of certain aspects of intrastate ratemaking, the United States Supreme Court reviewed the various theories of preemption:

> "Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Hines v. Davidowitz, 312 U.S. 52 (1941)." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, L. Ed. 2d 369, 106 S. Ct. 1890 (1986).

Congress was charged with establishing "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8. Thus, it enacted the Bankruptcy Act, 11 U.S.C. § 101 *et seq.* (1994)-and delegated power to the Supreme Court to prescribe bankruptcy procedural rules, 28 U.S.C. § 2075 (1994), and established the system of bankruptcy courts. Preemption occurs in bankruptcy law because the Constitution grants Congress plenary powers over bankruptcies, and the preemption is preemption of the field.

Antitrust law presents a different picture. Federal antitrust law is comprised of not one comprehensive act, but rather several narrower statutory schemes that were passed at various times in response to various historical stimuli. See Historical and Statutory Notes, Codifications, U.S.C.A., Title 15, Ch. 1; 15 U.S.C. § 12(a) (1994). The Sherman Act, which dates from the late 19th century, comprises §§ 1 to 7 of Title 15. It confers jurisdiction "to prevent and restrain violations of sections 1 to 7 of this title" on the federal courts, 15 U.S.C. § 4 (1994), and that jurisdiction is exclusive. *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U.S. 436, 440, 64 L. Ed. 649, 40 S. Ct. 385 (1920).

In *California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989), the Supreme Court held that, even though under federal law indirect purchasers are prohibited from recovering damages for violations of federal antitrust laws, indirect purchasers were permitted to recover under state antitrust law in a case where both federal and state antitrust laws were

involved. The Supreme Court's reasoning included the precept that antitrust is an area of the law traditionally regulated by the states: "Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." 490 U.S. at 101. Thus, the court applied the "presumption against finding pre-emption of state law in areas traditionally regulated by the States." 490 U.S. at 101. The Supreme Court further stated: "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman)," and "on several prior occasions, the Court has recognized that the federal antitrust laws do not preempt state law." 490 U.S. at 102. Thus, the Supreme Court found nothing in the Sherman Act that manifests a congressional intent to preclude state regulation of antitrust matters. Nor is there an express statement by Congress that state law is preempted. In the absence of federal preemption of the field of antitrust law, the Kansas Legislature devoted much of Chapter 50 of the Kansas statutes to regulation of restraint of trade and unfair trade practices. Thus, there is no field preemption, and all that remains for our consideration is the possibility of conflict preemption. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 368-69. See *Elkins v. Showcase, Inc.*, 237 Kan. 720, 727, 704 P.2d 977 (1985).

In *Del Rio v. Jetton*, 55 Cal. App. 4th 30, the defendants argued that by enacting 42 U.S.C. § 1988, Congress intended to occupy the entire field of remedies for civil rights actions. The California Court of Appeal disagreed, pointing out that subjective bad faith is not required for

an award of attorney fees under § 1988, whereas "[i]n contrast, a successful action for malicious prosecution in California requires proof not only that the underlying action was brought without probable cause, but also that it was initiated or continued with malice." 55 Cal. App. 4th at 36. Further, § 1988 is limited to recovery of fees and costs and provides no recovery for damages to reputation or emotional distress resulting from a civil rights violation.

The California Court of Appeal found no conflict between state and federal law that would mandate preemption:

> "State law is preempted to the extent that it actually conflicts with federal law, as when it is impossible for a private party to comply with both state and federal requirements, or when the state law imposes an obstacle to the accomplishment of the will of Congress. [Citation omitted.] No such obstacle exists in this case. Congress intended the fee-shifting provision in section 1988 to encourage plaintiffs to bring good faith civil rights actions, and to deter plaintiffs from bringing civil rights actions which lack foundation. A tort action for malicious prosecution against a plaintiff who brought a civil rights action without foundation, *and* with malice does not conflict with either of those purposes." 55 Cal. App. 4th at 36-37.

We find the California court's rationale persuasive and agree that no conflict exists that would preempt our state law.

In the present case, only the Barrack defendants argue that federal antitrust law preempts McShares' malicious prosecution and abuse of process claims. Aside from *East-Bibb Twiggs*, the cases they cite for this proposition are from the fields of bankruptcy and labor relations, both of which, according to Barrack defendants, entirely displace state law, citing *Char v. Matson Terminals Inc.*, 817 F. Supp. 850, 858 (D. Hawaii 1992) (former employee's defamation claim preempted by federal labor law). They cite no authority that would support the proposition that federal antitrust regulation entirely displaces state law.

The other appellees adhere more closely to the district court's rationale. They contend that Fed. R. Civ. Proc. 11 preempts state common-law actions for malicious prosecution and abuse of process that arise out of antitrust litigation because it is within the exclusive jurisdiction of the federal courts. In other words, they contend that the exclusive remedy for a party that has been the target of a malicious Sherman Act lawsuit is under Rule 11. Even the Barrack defendants contend that Congress' authorization of Rule 11 "sanctions for the filing of frivolous antitrust petitions should be read as an implicit rejection of other penalties including the kind of substantial damage awards that might be available in state court tort suits." This is the crux of their case, but appellees cite no authority that unqualifiedly supports it.

As we have seen, *Edmonds* and *Gonzales* are bankruptcy cases. That field of substantive law is completely occupied by federal law, and sanctions were authorized by a federal bankruptcy procedural rule as well as by Rule 11. *East-Bibb Twiggs* is a federal civil rights action in

which sanctions were statutorily authorized. Rule 11 was not an exclusive remedy in those cases.

Nor is Rule 11 a remedy that excludes tort remedies. In *Cohen v. Lupo*, 927 F.2d 363 (8th Cir. 1991), the federal Court of Appeals reversed the district court's dismissal of Cohen's malicious prosecution complaint. Cohen, along with more than 30 others, had been sued by clients of the law firm of Lupo & Stemmler on unmeritorious allegations of securities fraud. After 4 years of discovery produced no probative evidence of fraud, the district court granted summary judgment in favor of Cohen. Upon Cohen's Rule 11 motion, the district court awarded $100,000 for bad faith conduct. Then, Cohen filed a malicious prosecution suit seeking to recover the other $900,000 in fees and costs he had incurred in defending against the securities fraud allegations. The district court dismissed the malicious prosecution complaint on the ground that imposition of Rule 11 sanctions was res judicata. The Court of Appeals disagreed:

> "Rule 11 and the tort of malicious prosecution differ in their nature, the elements of the claims, and the potential remedies.
>
> "The district court did not decide whether the [original action] complaint was filed without probable cause, whether Lupo & Stemmler acted with malice, or the amount of damages Cohen suffered as a result of Lupo & Stemmler's misconduct. Those inquiries are irrelevant under Rule 11, but are the sum and substance of the tort of malicious prosecution. The nucleus of operative fact necessary to maintain an action for malicious prosecution includes the conclusion of the underlying action. Whether Cohen

would be victorious in the [original] litigation could not have been determined until the conclusion of that case.

"Federal Rule of Civil Procedure 11 grants a court discretion to discipline parties and counsel for conducting litigation in bad faith or in a frivolous and abusive fashion. Rule 11 is a procedural tool that under the Rules Enabling Act can not 'abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072. Rule 11 sanctions must be sought by motion in a pending case; there can be no independent cause of action instituted for Rule 11 sanctions. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 151 (5th Cir. 1988).

"On the other hand, the common law tort of malicious prosecution is a claim in its own right under applicable state law. In Missouri, malicious prosecution requires proof that: (1) the underlying offending lawsuit was initiated or maintained without probable cause; (2) the plaintiff in the initial suit acted with malice; (3) the proceeding terminated in favor of the defendant; and (4) the defendant suffered damages as a result of the suit. *Stafford v. Muster*, 582 S.W.2d 670, 675 (Mo. 1979). Rule 11 can not abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution resulting from frivolous, harassing, or vexatious litigation.

"The district court recognized that the $100,000 award under Rule 11 represented merely 'a fraction of the fees and costs incurred by [Cohen].' Lupo & Stemmler subjected Cohen to years of vexatious litigation and induced

> costs far exceeding that of the original investment. Cohen should have the chance to prove that [the original action] was conducted in such bad faith that it constituted malicious prosecution and, if successful in so proving, be compensated for his loss." 927 F.2d at 365.

In *Del Rio*, the California Court of Appeal also found no merit in the defendants' preemption argument based upon Rule 11. As we previously noted, the court disagreed with the holding in *East-Bibb Twiggs*. In rejecting the defendants' Rule 11 preemption argument, the court stated:

> "In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* (1991) 498 U.S. 533, 553 [111 S. Ct. 922, 934, 112-L. Ed. 2d 1140], the Supreme Court rejected a claim that rule 11 created a federal common law tort of malicious prosecution. 'The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. . . . [W]e are confident that district courts will resist the temptation to use sanctions as substitutes for tort damages.' Nothing in rule 11 indicates an intent to occupy the entire field of groundless suits brought for malicious purpose, nor is there any conflict between rule 11 and a damages action for such malicious prosecution." 55 Cal. App. 4th at 37.

In the present case, the district court dismissed the applicability of *Cohen* on the ground that it "arose out of general civil litigation and was not premised upon a specifically preemptive Federal statute." For the same reason, the district court distinguished *Business Guides* and *Lightning Lube* from the present case. Examination of

those three opinions reveals that the subject matter of each lawsuit is federally controlled and that in each lawsuit pendent state claims were asserted. *Cohen* involved securities, *Business Guides* involved copyright infringement, and *Lightning Lube* involved RICO. See 15 U.S.C. § 77a *et seq.* (1994); 17 U.S.C. § 101 *et seq.* (1994); and 18 U.S.C. § 1961 *et seq.* (1994).

Even if the district court's characterization of *Cohen, Business Guides,* and *Lightning Lube* as involving only "general civil litigation" were accurate, it would not be a sound reason for rejecting the principle they carry – Rule 11 is not an exclusive remedy, no matter what category of substantive law is involved. Rule 11 is a procedural tool with the central purpose of deterring unfounded claims, defenses, and contentions in federal district court. "Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a *specific filing* was, if not successful, at least well founded. Nor do sanctions shift the entire cost of litigation; *they shift only the cost of a discrete event.*" (Emphasis added.) 498 U.S. at 553. The Advisory Committee Notes contain the following comments on the 1993 amendments to Rule 11:

> *"Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions.* It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO,* [501 U.S. 32, 115 L. Ed. 2d 27, 111

> S. Ct. 2123] (1991). . . . Finally, it should be noted that *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process."* (Emphasis added.)

Given that Rule 11 would not bar McShares' bringing an independent action against the defendants/appellees for malicious prosecution or abuse of process in federal district court, the present state court action should not be dismissed on the ground that Rule 11 is an exclusive remedy.

Having concluded that the entire field of antitrust has not been preempted by federal law and that Rule 11 is not an exclusive remedy, all that remains for our consideration are issues of state public policy that the parties have called to the court's attention.

A state malicious prosecution action will lie only where the outcome of the federal case was favorable to the state court plaintiff. In that circumstance, the decision already has been made that there was no actionable antitrust violation by the state court plaintiff. The state court action would not include a redetermination of the question whether its plaintiff violated antitrust law. The determinations that would be made in the state court action would be whether there was probable cause for the federal action plaintiffs to allege that the state court plaintiff committed violations of antitrust law and, if not, whether the allegations were made with malice. *Lindenman v. Umscheid*, 255 Kan. 610, 624, 875 P.2d 964 (1994). Those determinations would not cause different results from the federal action. Nor is there potential for a different result in the abuse of process count. The essential elements of the action are a knowingly illegal or improper use of the

process done for the purpose of harassing or causing hardship, which resulted in damage to the state court plaintiff. *Porter v. Stormont-Vail Hospital,* 228 Kan. 641, 653-54, 621 P.2d 411 (1980).

With regard to potential for contravening federal policy, defendants/appellees suggest that state courts' entertaining malicious prosecution actions by successful federal antitrust litigants will dampen the enthusiasm for private parties' bringing antitrust actions. They cite antitrust case law endorsing a federal policy of encouraging privately prosecuted actions. The federal policy, however, does not extend to encouraging unfounded private antitrust actions. Moreover, for earnest private federal antitrust plaintiffs, the incentive of treble damage awards, 15 U.S.C. § 15(a) (1994), probably outweighs whatever disincentive might be posed by the possibility of a state court action for malicious prosecution.

In the same vein, it is argued by defendants/appellees that the state court action constitutes a collateral attack on the federal court judgment and that the state court's entertaining it would frustrate finality. Rather than being challenged, the finality of the federal court judgment is a necessary element in a malicious prosecution action. As for the perpetuation of litigation between or among the parties to the underlying antitrust action, there is no federal policy that defendants/appellees can point to that would preclude or even discourage a party injured by wrongful litigation from seeking redress. That the redress for malicious prosecution is being sought in a subsequent suit rather than as an adjunct proceeding in the underlying action would seem to be necessitated by the requirement of finality.

In its journal entry of judgment, the district court stated that even if the substantive law of the present case were not preempted, McShares' claims were barred "by operation of Federal . . . procedure." In particular, the statute of limitations and personal jurisdiction questions raised by some of the defendants "would require resolution of complex issues arising out of the Federal Rules of Civil Procedure. . . . Such determinations would certainly present a potential conflict in the interpretation of specific Federal procedural rules by a State Court of an area clearly within the exclusive province of the Federal Courts." This reasoning could apply to any state malicious prosecution action in which the underlying suit was in federal court regardless whether the substantive law was state or federal. Thus, by its own overbreadth, the rationale is self-defeating.

Finally, defendant Weinstein contends that this court's deciding that McShares' claims are actionable in state court would amount to usurpation of the legislative authority of Congress and, thus, violates the doctrine of separation of powers. Leaving aside the question of whether interaction of the federal legislative and state judicial branches falls within the doctrine, we can turn to the substance of the contention for a simple resolution of it. Weinstein's position is that Congress' failure to promulgate or enact an antitrust analogue to Bankruptcy Rule 9011 or 42 U.S.C. § 1988 limits remedies to Rule 11 sanctions. In other words, the premise of his argument is that Rule 11 is the exclusive remedy so that any tort remedy would be usurpation of the legislative function. As discussed above, the premise of the argument is faulty.

We conclude the district court erred in dismissing appellant's petition on the ground that appellant's claims were preempted by federal law. We note that the parties briefed additional issues, none of which was decided by the district court; thus, they were not subject to being cross-appealed or considered by this court on appeal.

The judgment of the district court is reversed, and the case is remanded for further consideration in conformity with this opinion.

APPENDIX B

IN THE DISTRICT COURT OF
SALINE COUNTY, KANSAS

MCSHARES, INC.,	)	
Plaintiff,	)	Case No.
	)	96-CVC-456
vs	)	
	)	
DONALD D. BARRY, ET AL.,	)	
	)	

JOURNAL ENTRY OF JUDGMENT

(Filed Dec. 18, 1997)

On October 10, 1997, the above-captioned case came on for hearing on the various motions filed by the several Defendants herein, requesting judgment on the pleadings, dismissal of the action, and/or for summary judgment. Plaintiff appeared by Attorneys J. Stan Sexton and Thomas Bradshaw. Defendants appeared by Attorneys Arlen Tanner, Norman Kelly, Richard Foster, Wayne Stratton and James Griffin. After hearing extensive oral argument, the Court requested the parties to file proposed findings of fact and conclusions of law by November 3, 1997, whereupon the Court took the matter under advisement.

FINDINGS

For purposes of the conclusions hereinafter set forth, the Court finds as follows:

1. On or about November 27, 1996, Plaintiff filed a Petition for damages against the Defendants herein alleging claims for malicious prosecution and abuse of process.

2. Plaintiff alleges that the Defendants acted without probable cause and with malice, and improperly and for an ulterior purpose and motive in filing against and continued prosecution of Plaintiff in *Albert City Elevator Co. v. Pestcon Sys., Inc., et al.* Case No. 93-CV-2496, in the United States District Court for the District of Kansas.

3. The Defendants are individual attorneys and law firms who represented the claimants against the Plaintiff's herein in the prior Federal Court action.

4. The prior Federal Court action against Plaintiff was premised solely upon alleged civil violations of Federal anti-trust laws, specifically the Sherman Anti-Trust Act, 15 U.S.C. § 1, et seq.

5. Without detailing the somewhat convoluted procedural history of the prior Federal Court case, the action consisted of several individual class action lawsuits against various parties filed pursuant to the Federal Rules of Civil Procedure, which cases were eventually consolidated and tried under procedures set forth in the Federal Court Manual for Management of Complex Litigation.

6. After extensive pre-trial proceedings, the Federal case was tried to a jury which returned, inter alia, a verdict in favor of Plaintiff herein against the claims of the parties represented by the Defendants herein.

7. No motion or other action was filed by the Plaintiff herein in the prior Federal case suggesting that any pleading filed by any of the Defendants herein was frivolous, unwarranted or filed for any improper purpose.

CONCLUSIONS

1. A determination of Plaintiff's cause of action alleged herein would require resolution of complex issues arising under a specific Federal statute, the Sherman Anti-Trust Act, 15 U.S.C. § 1, et seq.

2. Actions arising under the Sherman Anti-Trust Act are within the exclusive jurisdiction of the Federal Courts, and issues arising under such statute are beyond the jurisdiction of the State Courts, 15 U.S.C. § 4, § 1.

3. Determination of issues under the Sherman Anti-Trust Act would create the potential for impermissible conflict in interpretation and application of a complex Federal law, and would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

4. Assumption of jurisdiction by a state court over such controversies could also deter persons from exercising their rights under the specific Federal law if such exercise could subject them to a subsequent state action which would essentially present a collateral attack questioning the powers and determinations of the Federal Courts in an area within their exclusive jurisdiction.

5. The fact that some states have some form of "anti-trust" laws is essentially irrelevant to the fact that proceedings under the Sherman Anti-Trust Act – a specific Federal Statute – are within the exclusive province of the Federal Courts.

6. Although counsel have cited no specific cases involving the Sherman Anti-Trust Act, Kansas clearly

recognizes that where Congress has preempted a particular field by an award of exclusive jurisdiction, Federal Rule of Civil Procedure No. 11 preempts any state cause of action for abuse of process or malicious prosecution arising out of cases so exclusively reserved. *Edmonds v. Lawrence National Bank and Trust Co.*, 16 Kan.App.2d 331 (1991).

7. *Edmonds* is premised upon the Federal preemption of bankruptcy law and procedure by specific Federal Statutes, and cites the Federal case of *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987), in support of its ruling.

8. In *East-Bibb Twiggs Neighborhood Association v. Macon-Bibb Planning and Zoning Commission*, 674 F.Supp. 1475 (M.D.Ga. 1987), it was similarly held that a defendant in a Federal civil rights case was preempted from asserting a State Court claim for abusive litigation, the exclusive remedy being provided for by the Federal civil rights laws and Federal Rule 11.

9. This Court finds persuasive the direct analogy that, since Congress has vested exclusive jurisdiction over the Sherman Anti-Trust Act in the Federal Courts by specific statute, State Courts are preempted from determination of issues involving abuse of process or malicious prosecution arising out of Sherman Act litigation.

10. In such areas of preemptive jurisdiction, the rights of a party allegedly subjected to abusive, baseless, malicious or improper claims are to be determined by the remedies provided under Federal Rule 11, without the potentially conflicting interpretation of Federal law and procedure in a State Court. *Edmonds*, supra; *Gonzales*,

supra; *East-Bibb Twiggs*, supra. See also *Szabo Food Services, Inc. v. Canteen Corporation*, 823 F.2d 1073 (7th Cir., 1987).

11. The case of *Business Guides, Inc., v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991), is clearly distinguishable and is not persuasive or controlling in the present instance. The claims of abusive litigation involved in *Business Guides* arise under general civil litigation rather than out of some specifically preempted area of Federal law. Further, the scenario in *Business Guides* did not involve any attempt to assert claims in a State Court. The case of *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993), is similarly distinguishable and unpersuasive.

12. The case of *Cohen v. Lupo*, 927 F.2d 363 (8th Cir., 1991) did involve State Court claims arising out of Federal litigation; however, the allegedly abusive Federal action arose out of general civil litigation and was not premised upon a specifically preemptive Federal statute. Again, the general principles cited therein are distinguishable and are not controlling herein.

13. The Court further notes parenthetically that even if abusive litigation claims arising out of Sherman Act litigation were determined to fall within the concurrent subject matter jurisdiction of the State Courts, the determination of the other threshold issues raised by the Defendants herein with regard to Statute of Limitations and personal jurisdiction over some of the parties would require resolution of complex issues arising out of the Federal Rules of Civil Procedure relating to class action litigation; relating the effect of amendments to pleadings;

and relating to the effects of consolidation of cases. Such determinations would certainly present a potential conflict in the interpretation of specific Federal procedural rules by a State Court of an area clearly within the exclusive province of the Federal Courts.

14. It is the conclusion of the Court, therefore, that the subject matter of the Plaintiff's claims herein is preempted by operation of Federal law and procedure, and states no claim cognizable by a State Court.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiff's Petition and each cause of action therein claimed, should be and hereby is dismissed as against all named Defendants.

Entered in Chambers on this 18th day of December, 1997.

/s/ Daniel L. Hebert
DANIEL L. HEBERT,
DISTRICT JUDGE

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No. 98-1506

In The

Supreme Court of the United States

DONALD D. BARRY, ESQ., et al.,

Petitioners,

vs.

McSHARES, INC., d/b/a RESEARCH PRODUCTS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

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QUESTION PRESENTED

1. Did the Supreme Court of Kansas properly reverse the order of the trial court granting judgment for petitioners in a state court civil action for malicious prosecution and abuse of process on the grounds that Federal Rule of Civil Procedure 11 and Federal Antitrust Law do not preempt state malicious prosecution and abuse of process claims arising out of Federal Antitrust actions.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent McShares, Inc., d/b/a Research Products, respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Kansas. That opinion is reported at *McShares v. Barry*, 266 Kan. 479, 970 P.2d 1005, 1015 (Kan. 1998).

STATEMENT OF CASE

I. NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE SUPREME COURT OF KANSAS

Respondent McShares, Inc. was a defendant in a federal antitrust class action, based on the alleged violation of the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, styled *Albert City Elevator Co. v. Pestcon Sys., Inc., et al.*, Case No. 93-CV-2496, filed by the petitioners and others on December 3, 1993 in the United States District Court for the District of Kansas. The *Albert City* case was later combined by the federal district court with other similar class actions, for pretrial and trial purposes, into Master File No. 93-2452-KHV. McShares, Inc. prevailed at the trial of the federal antitrust class action and judgment was entered in favor of McShares on October 31, 1995 in the separate *Albert City* action, Case No. 93-CV-2496-KHV. Respondent did not file a motion for sanctions against the petitioners and antitrust plaintiffs for bringing a frivolous claim against respondent, pursuant to Federal Rule of Civil Procedure 11, at any time during or at the conclusion of the federal antitrust class action.

On November 27, 1996, within one year of the date when the *Albert City* judgment became final, respondent McShares filed this state common law action for malicious prosecution and abuse of process against the petitioners and other defendants based on their abusive actions in naming and prosecuting respondent McShares for alleged federal antitrust violations. The petitioners removed the case to federal court, but the case was remanded due to the failure of all defendants to timely join in the removal. Some of the defendants moved for judgment on the pleadings, dismissal of the action, and/or alternatively, for summary judgment, on the grounds that respondent's common law actions for abuse of process and malicious prosecution arising out of Sherman Act litigation were totally preempted by Federal Rule of Civil Procedure 11. The District Court of Saline County, Kansas sustained defendants' motions and dismissed respondent's causes of action on the grounds that federal antitrust law and Federal Rule of Civil Procedure 11 preempt any state cause of action for abuse of process or malicious prosecution which arises out of claims which are within a federal court's exclusive jurisdiction. The Supreme Court of Kansas subsequently reversed the trial court and remanded the case to the District Court of Saline County, Kansas for further proceedings, holding that state law claims for malicious prosecution and abuse of process based on an underlying antitrust claim were not preempted by federal antitrust law or Federal Rule of Civil Procedure 11.

REASONS FOR DENYING THE WRIT

I. The Kansas Supreme Court Correctly Held That Federal Rule of Civil Procedure 11 Does Not Preempt or Replace State Law Claims for Malicious Prosecution and Abuse of Process Based Upon Federal Claims Exclusively Within the Jurisdiction of the Federal Court.

The opinion of the Kansas Supreme Court that state law malicious prosecution and abuse of process claims arising out of federal antitrust actions are not preempted by federal antitrust law or Federal Rule of Civil Procedure 11 correctly followed prior relevant decisions of this Court holding that Federal Rule of Civil Procedure 11 does not supplant state law malicious prosecution claims and that federal antitrust law does not preempt state law remedies. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 112 L. Ed. 2d 1140, 119 S. Ct. 922 (1991) and *California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

A. The Kansas Supreme Court Correctly Ruled That State Law Claims For Malicious Prosecution and Abuse of Process Are Not Preempted by Federal Antitrust Law.

Federal antitrust statutes do not preempt state law claims for malicious prosecution and abuse of process. This Court has previously determined the relevant considerations in ascertaining when Congress has preempted state regulation or law in a given case. In *California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989) this Court stated:

> The path to be followed in preemption cases is laid out by our cases. It is accepted that Congress has the authority, in exercising its Article I powers, to preempt state law. In the absence of an express statement by Congress that state law is preempted, there are two other bases for finding preemption. First, when Congress intends that federal law occupy a given field, state law in that field is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212-213, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983). Second, even if Congress has not occupied the field, state law is nevertheless preempted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941). *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984).

490 U.S. at 100-101.

In order to determine whether or not Congress intended to preempt common law claims of malicious prosecution and abuse of process, it is necessary to review the various tests for federal preemption in light of federal antitrust law and state malicious prosecution and abuse of process claims. This analysis must be made in light of the presumption against finding preemption of state law in areas traditionally regulated by the states,

such as antitrust. *See California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

First, petitioners do not argue that Congress made an explicit statement that all state law in the field of antitrust is preempted. No such statement may be found in the federal antitrust laws.

Second, petitioners do not and cannot persuasively argue Congress has thoroughly occupied the legislative field of antitrust law so as to "make reasonable the inference that Congress left no room for the states to supplement it." This contention was rejected by the United States Supreme Court in *California v. ARC American Corporation*, 490 U.S. 93, 101, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

Third, there is no actual conflict between state malicious prosecution and abuse of process claims and federal antitrust law. *See Florida Lime Avocado Growers v. Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963). In this case, there is no conflict between permitting recovery for frivolous and abusive antitrust litigation under state law and permitting recovery for legitimate claims that federal antitrust laws have been violated.

Petitioners argue that Kansas malicious prosecution and abuse of process claims based on an unsuccessful federal antitrust claim are implicitly preempted because the state law claims are "an obstacle to the purposes and objectives of Congress" in enacting the federal antitrust laws. Petitioners fail to satisfactorily explain why the state law claims are an "obstacle to the purposes and objectives of Congress" and a close examination of this contention reveals that it is devoid of merit.

The premise of petitioners' preemption argument is that state malicious prosecution and abuse of process claims will act as a disincentive to persons contemplating pursuing antitrust claims. Petitioners cite no legal or factual basis in support of this assumption. There is certainly no federal policy encouraging unfounded or frivolous antitrust actions or of discouraging persons injured by wrongful litigation from seeking redress. *See Del Rio v. Jetton*, 55 Cal. App. 4th 30, 63 Cal. Rptr. 2d 712 (1997) (tort action for malicious prosecution does not conflict with Section 1988's purpose of encouraging good faith civil rights actions).

Further, assuming that persons with meritorious antitrust claims are not deterred by the prospect of sanctions under Federal Rule of Civil Procedure 11, there is no reason to believe that state remedies will operate as a disincentive. Federal Rule of Civil Procedure 11 currently subjects a lawyer signing a federal court pleading to an objective standard of reasonable inquiry, a standard similar to the probable cause inquiry presently required under Kansas law of malicious prosecution. *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438, 449 (1980); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 112 L. Ed. 2d 1140, 119 S. Ct. 922 (1991). In this case, it is not necessary to deprive Kansas citizens of their state law remedies for abuse of process and malicious prosecution in order to avoid creating a disincentive for plaintiffs with meritorious antitrust claims.

This Court has clearly rejected federal preemption of state laws in antitrust cases on the basis of speculative antitrust claim "disincentives" which are merely incidental to state law claims. Assuming, arguendo, that there is

any basis for the dubious speculation that plaintiffs with meritorious antitrust claims will, despite the prospect of recovering treble damages and attorneys fees, be deterred by the prospect of state court remedies, it is an insufficient basis upon which to eliminate state tort remedies.

In *California v. ARC American Corporation*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989), this Court held that state antitrust statutes permitting recovery by indirect purchasers were not preempted by the federal antitrust law rule barring indirect purchasers from recovering damages for violations of federal antitrust laws. Reversing the Ninth Circuit, this Court held that state laws permitting indirect purchaser recoveries from antitrust defendants did not pose an obstacle to the accomplishment of the purposes and objectives of Congress even though the state laws might have an indirect effect on incentives to bring suit. This Court rejected the reasoning that allowing state indirect purchaser claims could reduce the incentives of direct purchaser to bring antitrust actions by reducing their potential recoveries, that the presence of indirect purchaser claims would reduce settlement offers to direct purchasers, and that if the total liability was to exhaust an antitrust defendant's assets, the direct purchasers would have to share the antitrust defendant's estate in bankruptcy with indirect purchasers. This Court stated, in language that is instructive for the instant case.

> Indeed, taken to its extreme, the Court of Appeals' logic would lead to the preemption of any state law claims against antitrust defendants, even if wholly unrelated, because the presence of other litigation could threaten the

> defendants with bankruptcy and reduce their willingness to settle.

490 U.S. at 104.

This Court rejected the contention that indirect purchasers' claims under state law should be preempted because those claims would operate as a disincentive by reducing the amount that can be paid to direct purchasers. In this case, assuming the prospect of a state malicious prosecution and abuse of process claim operates as a disincentive to meritorious federal antitrust claims, that disincentive is even more *de minimis* and remote than the "disincentive" at issue in the *California v. ARC American Corporation* case, *supra* in light of the existing disincentive under the standards of Federal Rule of Civil Procedure 11.

Finally, petitioners raise the specter of state court "collateral attacks" on federal court decisions. This is also an illusory "risk." Petitioners seem to suggest that if respondent is allowed to seek redress under state law for abuses of a federal antitrust action, there is a risk of inconsistent results or "interference" with federal antitrust law. First of all, by definition, a malicious prosecution claim cannot be brought until the federal court has resolved the antitrust claim in favor of the party asserting the malicious prosecution claim. Therefore, "interference" is an impossibility. Second, any risk of a Kansas court reaching a decision inconsistent with a federal court on an identical issue is illusory in light of Kansas law recognizing collateral estoppel. *Bud Jennings Carpets & Draperies, Inc. v. Greenhouse*, 210 Kan. 92, 499 P.2d 1096, 1100 (1972).

B. Federal Rule of Civil Procedure 11 Does Not Preempt State Law Claims for Abuse of Process and Malicious Prosecution

The Kansas Supreme Court correctly decided that Federal Rule of Civil Procedure 11 does not preempt state common-law actions for malicious prosecution and abuse of process claims that arise out of federal antitrust litigation. The Kansas Supreme Court correctly recognized that Federal Rule of Civil Procedure 11 is a procedural tool, which under the Rules Enabling Act cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. The Kansas Supreme Court also recognized that the Advisory Committee Notes on the 1993 Amendments to Federal Rule of Civil Procedure 11 provide:

> *"Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions.* It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO,* 501 U.S. 32, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991). . . . Finally, it should be noted that *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process."* (Emphasis added.)

McShares v. Barry, 266 Kan. 479, 970 P.2d 1005, 1015 (Kan. 1998).

Even before the 1993 revisions to Federal Rule of Civil Procedure 11 were enacted by Congress, this Court

made it clear that Federal Rule of Civil Procedure 11 is not intended to preempt independent tort law claims. In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991), the appellant Business Guides appealed a trial court's order imposing monetary sanctions against it and dismissing its case for Federal Rule of Civil Procedure 11 violations. *Business Guides* argued that imposing sanctions under Federal Rule of Civil Procedure 11 violated the Rules Enabling Act (28 U.S.C.S. § 2072) because it "effectively creates a federal tort of malicious prosecution, thereby encroaching upon various state law causes of action." *Id.* at 551-552. This Court stated, unequivocally, that "*Business Guides'* argument that Federal Rule of Civil Procedure 11 creates a federal common law of malicious prosecution" is "**without merit**." 498 U.S. at 553 (emphasis added).

> The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. [citation omitted]. . . . Additionally, **we are confident that district courts will resist the temptation to use sanctions as substitutes for tort damages.**

Id. (emphasis added). No language could be clearer. The 1993 revisions to Federal Rule of Civil Procedure 11 and the Advisory Committee Notes explaining those revisions codify the *Business Guides'* holding – Federal Rule of Civil Procedure 11 is not intended to preclude or be a substitute for an independent action for malicious prosecution or abuse of process.

In *Cohen v. Lupo*, 927 F.2d 363 (8th Cir. 1991), a case decided the same year as *Business Guides*, and which is

closely analogous to the instant case, Cohen was sued in an underlying class action for federal securities fraud. After four years of discovery, the securities' claims against Cohen were dismissed on summary judgment. Cohen then moved for Federal Rule of Civil Procedure 11 sanctions and the trial court awarded $100,000.00 in monetary sanctions against the Lupo plaintiffs and their attorneys. Cohen then filed a separate state law action for malicious prosecution to recoup the extensive fees and costs of nearly one million dollars incurred in defending the securities fraud case. *Id.* at 364-365. The malicious prosecution defendants argued that the doctrine of *res judicata*, based on the Federal Rule of Civil Procedure 11 sanctions, precluded Cohen's state action for malicious prosecution. *Id.* at 365. The Court rejected Lupo's arguments holding that "the common law tort of malicious prosecution is a claim in its own right under applicable state law." *Id.* The *Cohen* court opined that Federal Rule of Civil Procedure 11 and the tort of malicious prosecution differ "in their nature, the elements of the claim, and the potential remedies." *Id.* The court instructed:

> [W]hether Lupo & Stemmler acted with malice, or the amount of damages Cohen suffered as a result of Lupo & Stemmler's misconduct [are] irrelevant under Rule 11, but are the sum and substance of the tort of malicious prosecution. The nucleus of operative fact necessary to maintain an action for malicious prosecution includes the conclusion of the underlying action. Whether Cohen would be victorious in the *Bastien* litigation could not have been determined until the conclusion of that case.

Id. at 365.

The Third Circuit has also firmly rejected the argument that a motion under Federal Rule of Civil Procedure 11 preempts a state malicious prosecution action. In *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993), Witco argued that the district court's denial of two Federal Rule of Civil Procedure 11 motions against Witco and Witco's counsel, based on Witco's filing a counterclaim, barred the jury from inferring any malice in determining punitive damages in Lightning Lube's tortious interference claim. *Id.* at 1196. The trial court rejected this argument and the Third Circuit affirmed holding:

> Inasmuch as the denial of a Rule 11 motion does not foreclose the assertion of a subsequent malicious prosecution suit, [citations omitted], neither should it automatically prevent an award of punitive damages predicated on conduct of which the moving party on the Rule 11 motion complained.

Id. at 1196. *Accord, Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162 (9th Cir. 1991) (denial of Federal Rule of Civil Procedure 11 motion will not support federal court's enjoining state malicious prosecution proceeding).

Petitioners argue that Federal Rule of Civil Procedure 11 preempts state law malicious prosecution and abuse of process claims based on underlying causes of action wherein the federal courts have exclusive jurisdiction. Petitioners' argument is as follows: (1) antitrust is an exclusively federal action; (2) the issue of whether the underlying claim was instituted without probable cause is necessarily a question involving federal law decisions and (3) therefore, the probable cause issue must *only* be

decided through Federal Rule of Civil Procedure 11 in federal court.

Petitioners offer no persuasive reason or authority supporting the conclusion that Federal Rule of Civil Procedure 11 is the exclusive remedy for frivolous antitrust federal claims. This Court has consistently held that state courts may decide questions of federal law. State courts are quite capable of reviewing and following federal precedent and do so routinely in nonremovable cases where federal defenses and counterclaims are asserted. *See, Caterpillar, Inc. v. Williams*, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987) and *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986).

In *Berg v. Leason*, 32 F.3d 422 (9th Cir. 1994) the defendant in a federal securities action was granted summary judgment by the federal court. The defendant then sued the plaintiff for malicious prosecution in state court. The matter was removed to federal court on the grounds that since the malicious prosecution claim was based on an alleged violation of federal law, it presented a federal question thereby conferring jurisdiction on the federal court. Although the district court denied the plaintiff's motion to remand, the Ninth Circuit reversed, holding that no federal question jurisdiction existed for three reasons: (1) the state court need only decide whether the underlying claim was "legally tenable;" (2) the cause of action was created by state law, and (3) state law controls the standard by which the strength of a federal claim in the underlying action is measured. *Berg*, 32 F.3d at 423. In coming to its conclusions, the federal appellate court

considered the following arguments raised by the defendant. First, the defendant argued that the state court would have to analyze federal securities and RICO claims and whether probable cause supported them, which presented pivotal and substantial questions of federal law. *Id.* at 424. Rejecting this first argument, the court stated:

> Berg's burden is not to show that RICO, or the securities law, were or were not violated; that, of course, was favorably determined in the underlying action. Rather, "the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." *[citation omitted]*. "Legally tenable" is a low level of generality. . . .

Berg, 32 F.3d at 424-425. More significantly, the court held that "how much merit the underlying action must have is a state-law matter . . . that federal law is not dispositive because the degree of strength required to put the underlying federal claim over the probable cause threshold is determined by state law." *Id.* at 425.

Second, the defendant argued that allowing independent state court actions for abusive federal litigation would inhibit plaintiffs from bringing legitimate actions under federal law. *Id.* at 425. The *Berg* appellate court rejected this second argument. "We do not see how: Two federal courts have already determined that Leason's federal claims lacked merit. The federal interest, which lies in providing a forum for the protection of federally-created rights, has already been served and will not be

disserved by a state court determining whether the federal complaint met the test of being 'legally tenable.' " *Id.* at 425.

Finally, the defendant raised a "preemption-like" argument that since Congress has given the federal court exclusive jurisdiction over the 1934 Federal Securities Act, that federal judges know more about the securities laws than do state judges. Again, the Ninth Circuit rejected the argument, although acknowledging that federal judges may have more expertise in the area of the federal securities law.

> State courts resolve matters of federal law in similar circumstances with no difficulty. . . . In these circumstances state courts directly decide issues of federal law, yet their capacity to do so is inherently a part of the well-pleaded complaint rule. [citation omitted] We therefore see no reason why concern for consistency of federal law – which animates the doctrine of preemption as well as the doctrine of exclusive jurisdiction – should convert a state cause of action with only a tangential federal element into a substantial federal question.

Berg, 32 F.3d at 426.

Berg makes clear that all the Kansas trial court is required to do in respondent's malicious prosecution case is to make a determination as to whether or not the underlying federal complaint filed in the *Albert City* antitrust class action was "legally tenable." This analysis requires the trial court to determine, on the basis of facts known by the defendants, whether their actions in initiating and maintaining the antitrust complaint against

plaintiff was "objectively reasonable" under the standards for probable cause and malice set forth by Kansas law. "The federal element in an action for malicious prosecution is not substantial when the probable cause threshold is crossed by a legally tenable claim." *Berg*, 32 F.3d at 425. Since neither the factual part of the probable cause element, nor the separate question of malice, turns at all on federal law, the Kansas trial court is well-qualified to make the threshold determinations necessary to test the sufficiency of plaintiff's malicious prosecution and abuse of process claims and no special expertise in federal antitrust law is required.

The petitioners primarily cite cases from the bankruptcy arena in support of their argument that Federal Rule of Civil Procedure 11 preempts state law malicious prosecution and abuse of process claims. The Kansas Supreme Court correctly recognized that these cases are distinguishable. With respect to bankruptcy, the Kansas Supreme Court correctly noted that unlike federal jurisdiction of antitrust law, federal bankruptcy law preempts the entire field of bankruptcy.

> Congress was charged with establishing "Uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. Thus, it enacted the Bankruptcy Act, 11 U.S.C. § 101 *et seq.* (1994) and delegated power to the Supreme Court to prescribe bankruptcy procedural rules, 28 U.S.C. § 2075 (1994), and established the system of bankruptcy courts. Preemption occurs in bankruptcy law because the Constitution grants Congress plenary powers over bankruptcies, and the preemption of the field.

McShares v. Barry, 266 Kan. 479, 970 P.2d 1005, 1011 (Kan.1998)

Unlike bankruptcy preemption, this Court has already decided that federal antitrust laws do not preempt the field. *See California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

Similarly, the argument that Federal Rule of Civil Procedure 11 preempts state malicious prosecution and abuse of process claims based on Labor Management Relations Act cases is also flawed. The case of *Furillo v. Dana Corp. Parish Div.*, 866 F. Supp. 842 (E.D. Pa. 1994) is distinguishable because it involved the construction of a collective bargaining agreement, a task which this Court has previously held must be decided under federal law. In *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1962), this Court explained why the meaning given to terms in collective bargaining agreements must be determined by federal law:

> "[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . *The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.* Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.

> Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to it interpretation . . . [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes" (footnote omitted). (emphasis supplied). *Id.* at 103-104.

The existence of the possibility that individual contract terms might have different meanings under state and federal law is not applicable in this case. Here, the trial court will be required to ascertain, *inter alia*, whether or not the federal antitrust claim was instituted without probable cause and with malice. While this determination may require the trial court to determine whether or not defendants possessed sufficient evidence or information to support a federal antitrust claim at the time they instituted their claims, it will not require the trial court to develop federal antitrust laws different than the body of law that has been fashioned by the federal courts.

Petitioners cannot cite to even *one* case holding that independent tort claims for malicious prosecution or abuse of process arising from federal antitrust litigation are preempted by Federal Rule of Civil Procedure 11. The authorities cited by the petitioners for extending Federal Rule of Civil Procedure 11's preemption beyond the bankruptcy area include two 1987 federal civil rights cases and a RICO case. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Commission*, 674 F. Supp. 1475 (M.D. Ga. 1987), *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 420, 507 S.E.2d 191 (1998) and *Szabo Food Services, Inc. v. Canteen Corp.*, 823 F.2d 1073

(7th Cir. 1987). *East-Bibb, Great Western Bank* and *Szabo Food* are factually and legally distinguishable from this case.

In *East-Bibb,* a federal civil rights suit defendant brought a counterclaim against the plaintiffs for abusive litigation based on Georgia state law. The district court dismissed the counterclaim on the basis that the counterclaim was preempted by the combination of 42 U.S.C. § 1988, the Attorney's Fees Awards Act of 1976 which allows a "prevailing" civil rights litigant to recover for its attorney's fees, and by Federal Rules of Civil Procedure 11. *Id.* at 1476. Without any citation to case authority and noting that the issue was one of first impression for the circuit, the *East-Bibb* court reasoned that by enacting 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 11, Congress simply preempted the entire area of abusive claims based upon federal law. *Id.* at 1476-1477. Unlike the aggrieved defendant in *East-Bibb,* respondent McShares had no similar remedies available to recover its costs, including its reasonable attorneys' fees, in defending the frivolous antitrust litigation brought by the defendants herein. There is no comparable federal statute allowing prevailing federal antitrust defendants to recoup their attorneys' fees, such as the Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988, which is available to civil rights litigants. Although successful federal antitrust plaintiffs can recover their costs, including reasonable attorneys' fees, 15 U.S.C. § 15, there is no similar statutory remedy for prevailing antitrust defendants. Second, *East-Bibb* was analyzed under the 1983 version of Federal Rule of Civil Procedure 11, which made the award of

expenses [including reasonable attorneys' fees] mandatory for Federal Rule of Civil Procedure 11 violations.

> . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiate, **shall** impose upon the person who signed it, . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

East-Bibb Twiggs Neighborhood, 674 F. Supp. at 1476, n.1 (citing entire text of former Federal Rule of Civil Procedure 11, 1987 supplement) (emphasis added); *accord*, *Schrag v. Dinges*, 153 F.R.D. 665, 666 (D. Kan. 1994).

Similarly, the Georgia court in *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 420, 507 S.E.2d 191 (1998) did not take into account the 1993 changes to Federal Rule of Civil Procedure 11. Further, all the cases relied upon by the *Great Western* court were decided prior to the 1993 changes to Federal Rule of Civil Procedure 11. Today, parties such as respondent herein, who are forced to incur hundreds of thousands of dollars to defend against the initiation and prosecution of a frivolous civil antitrust suit, have no guaranteed remedy available under federal law or federal procedure to recover damages, including reasonable attorneys' fees expended in defense of the frivolous suit. Even if the respondent had successfully brought a Federal Rule of Civil Procedure 11 motion against the defendants in the underlying federal antitrust litigation, the federal trial court was required to follow a policy of applying the least severe sanctions

adequate to serve the purpose. *Kiser v. Boeing Co.*, 163 F.R.D. 13 (D. Kan. 1995). Even where the court imposes a monetary sanction, it should ordinarily be paid into the Court as a penalty, not paid to the injured party. *Thomas v. Treasury Management Ass'n*, 158 F.R.D. 364, 370 (D.C. Md. 1994); Federal Rule of Civil Procedure 11, Notes of 1993 Advisory Committee. Thus, federal antitrust litigants, unlike civil rights litigants, have no adequate remedy under federal law or federal procedure; the only adequate remedy for antitrust defendants to recover their damages, including attorney's fees incurred in defending frivolous federal antitrust lawsuits, is through an independent state law action for malicious prosecution and abuse of process.

The petitioners' reliance on *Szabo Foods, supra,* is also misplaced. In *Szabo Foods,* after a federal civil rights plaintiff voluntarily dismissed its claims, the defendant brought a motion under Federal Rule of Civil Procedure 11 for sanctions, including an award of its costs and attorneys' fees. The Seventh Circuit held that despite the plaintiff's voluntary dismissal of its claim, the plaintiff was still liable for the defendant's attorneys' fees as a sanction under Federal Rule of Civil Procedure 11 for bringing a frivolous claim. *Szabo Foods,* 823 F.2d at 1084. *Szabo Foods* is factually distinguishable from the case at hand because it did not involve an independent state law claim for malicious prosecution or abuse of process. The case does not even discuss whether Federal Rule of Civil Procedure 11 motions preempt state law claims for abusive litigation. Instead, the *Szabo Foods* court analyzes the fact that even though the defendant could not bring a claim under the civil rights Attorneys' Fees Awards Act

of 1976, 42 U.S.C. § 1988, since the plaintiff had voluntarily dismissed its suit, Federal Rule of Civil Procedure 11 still provided the defendant with a remedy to recover its attorneys' fees. *Id.* at 1077. Like *East-Bibb*, the *Szabo Foods* court relied on and applied the 1983 version of Federal Rule of Civil Procedure 11 to the defendant's arguments, finding that an award of costs, including attorneys' fees, were mandatory even against prevailing parties if the court finds that the claim was frivolous. Discussing former Federal Rule of Civil Procedure 11's mandatory sanctions, the court stated: "This implies that a court always should be able to award fees, whether the plaintiff wins, loses on the merits, or dismisses his own case." *Szabo*, 923 F.2d at 1077.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the issues raised by petitioners have previously been resolved by this Court. The Kansas Supreme Court correctly followed the precedents of this Court and there is no reason why the Petition merits further review. The Petition presents no important question of federal law nor any conflicts among or between the circuit courts of appeal and state courts of last resort. For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

DONALD D. BARRY, ESQ., et al.,

Petitioners,

vs.

McSHARES, INC., d/b/a
RESEARCH PRODUCTS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Kansas

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ARGUMENT IN REPLY

I. The Federal District Court Determined Probable Cause Existed To Continue The Underlying Antitrust Action

In its claim that a state action would not be a collateral attack on the federal case and determinations, McShares seeks to focus solely on the judgment entered on the jury verdict in its favor in the underlying antitrust case. McShares ignores all the rulings and determinations of the Federal District Court Judge, including denial of McShares' Motions for Summary Judgment, Dismissal and Directed Verdict. These other rulings and determinations of the Federal District Court, acting within its exclusive jurisdiction, are those which McShares is collaterally attacking and which are preempted from state review as set forth in the Petition for a Writ of Certiorari.

An examination of selected findings from the Federal District Court in the underlying action demonstrates the Federal District Court's determinations.

> Construed in light most favorable to plaintiffs, the record creates a fact issue with respect to whether Detia Degesch, Degesch America, Research Products (McShares) and Pestcon were conspiring in 1988 and 1989 to maintain and/or coordinate a decline in prices. Evidence of this conspiracy combined with Bernardo's entry into the market charging substantially lower prices (at well below $340.00 a case) defendant's concerns that Bernardo's low prices were "screwing up" the market and that defendants would have to get Bernardo "in line," and Jerry Sullivan's statement that in order to let distributors compete Degesch America would have to sell to

> them at $340.00 a case, **supports a reasonable inference that but for the alleged conspiracy to charge then higher prices, defendant's competitive prices would have been lower than what they were currently charging.**

In re Aluminum Phosphide Antitrust Litigation, 905 F.Supp. 1457, 1468 (D. Kan. 1995), *emphasis added*. The Federal District Court set forth certain facts supporting allegations of a price-fixing conspiracy. *Id.* at 1466-67. The Federal District Court recognized that by May and June of 1988, evidence suggested that four firms dominated the aluminum phosphide market, including McShares, d/b/a Research Products, and that McShares, with two others, engaged in continuous communications related to pricing. *Id.* at 1461, 1466.

Comity, Federalism, Inherent Powers And Avoidance Of Forum Shopping

While courts have examined the issue of precluding state courts from second-guessing federal courts in subsequent state actions, under a preemption analysis, the same rationale and compelling logic can also be found in cases that held such state court review of an area of federal jurisdiction violates well-established principles of comity and federalism, thereby detracting from the inherent powers granted to federal courts. *Thomason v. Lehrer*, 183 F.R.D. 161, 171-72 (D. N.J. 1998).

In *Thomason*, the Federal District Court Judge held that one who seeks to assert an abuse of process claim against an attorney-adversary, based upon conduct which occurred in a case that had been pending before a United

States District Court, must seek redress in the Federal District Court, and not in state court. *Id.* at 163.

Federal District Courts are vested with inherent powers enabling them to fashion appropriate remedies to uphold the integrity of federal judicial proceedings and oversee the conduct of attorneys who practice before them. *Id.* at 169. "The central component of this broad grant of authority embodied in the inherent powers of federal courts is the principle that a District Court is the appropriate forum in which to seek redress for the alleged abuses of its processes." *Id.* at 170, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

Permitting a state court to inquire into the propriety of pleadings filed in a case pending before a federal court would upset the delicate balance struck by the venerable policies of comity and "what Justice Black described as 'our federalism.' " *Thomason*, 23 F.R.D. at 171, citing *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). The fundamental principles of comity instruct federal and state courts to avoid infringing upon each other's prerogatives. *Thomason*, 183 F.R.D. at 171. The *Thomason* Court held that permitting attorneys to harass their federal court adversaries in a collateral state court proceeding would encourage forum shopping, judge shopping, and the multiplication of litigation. *Id.* at 172. Adopting a rule prohibiting such cases from being filed in the state court conserves state judicial resources and avoids the evils of judge shopping and forum shopping. *Id.* at 172. "[I]t is perfectly consistent with principles of comity and the conservation of judicial resources to require litigants . . . to seek relief solely in the court where the alleged transgression occurred." *Id.*

Where an allegedly frivolous federal cause of action was asserted in federal court, to seek redress for such "litigation abuse," a party must pursue the available federal remedies in federal court. *Mruz v. Caring, Inc.*, ___ F.Supp. ___, 1999 WL 152356 at *7 (D. N.J. 1999).

> Because the allegedly frivolous cause of action . . . was based on federal law, the Attorney Defendants' right to seek attorneys' fees and costs can only arise from the allegedly frivolous federal claim. Thus, under the circumstances of this case, the Attorney Defendants' right to seek attorneys' fees and costs is based on federal, not state law. Consequently, to obtain the relief they seek, the Attorney Defendants must pursue their federal remedies.

Id. at *8. See also *Reitz v. Dieter*, 840 F.Supp. 353 (E.D. Pa. 1993); *Jones v. Credit Bureau of Garden City, Inc.*, 703 F.Supp. 897, 898-99 (D. Kan. 1988).

The *Mruz* court held that,

> because the jurisdictional basis supporting Plaintiffs' alleged frivolous claim was this Court's federal question jurisdiction, the Attorney Defendants must avail themselves of the federal remedies available to recover the attorneys' fees and costs. . . . Accordingly, because the Attorney Defendants may not assert a state law cause of action to recover attorneys' fees and costs associated with defending against a federal claim in federal court, I shall grant [the] motion to dismiss. . . .

Mruz, 1999 WL 152356 at *10.

In light of the determinations by the Federal District Court, overruling McShares' Motion to Dismiss, for Summary Judgment and Directed Verdict, together with the

decision of the Federal District Court to submit the matter to a jury, such matters of probable cause and improper purpose have been conclusively determined by the federal court. Any requests for attorneys' fees and costs or allegations of a lack of probable cause should have been raised in the underlying suit before the Federal District Court.

The Probable Cause Required To Get To A Jury Is Greater Than That Needed To Survive A Malicious Prosecution Or Abuse Of Process Claim

The probable cause required by a federal court to permit a matter to go to jury and survive dispositive motions, requires, of a necessity, a higher level of probable cause than is needed in Kansas to survive a claim for malicious prosecution. The Kansas Supreme Court recently held:

> Probable cause for instituting a proceeding exists when there is a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining.

Bergstrom v. Noah, 974 P.2d 520, 1999 WL 112030 at *6 (Kan. 1999).

> If the legal validity of a claim is uncertain, the question is not whether the person bringing the claim is correct in believing that the Court would sustain the claim, but rather it is whether that person's opinion that there was a sound chance that the claim might be sustained was a reasonable one.

Id.

The Federal District Judge, in the underlying case, determined that the evidence "supports a reasonable inference that but for the alleged conspiracy to charge then higher prices, defendants' competitive prices would have been lower than what they were currently charging." *Aluminum Phosphide Antitrust Litigation*, 905 F.Supp. at 1468. Permitting a state collateral review of such determinations, arising from exclusively federal questions, violates the principles of comity and are preempted.

II. McShares' Cases Are Distinguishable

Several of the cases upon which McShares relies were discussed and distinguished in the Petition for a Writ of Certiorari and will not be readdressed here. Of the other cases raised by McShares, none addresses the issue raised for review in the Petition for a Writ of Certiorari and are distinguishable by their facts or procedural posture.

California v. ARC America Corporation, 490 U.S. 93 (1989), held, as Congress had not undertaken to provide antitrust protections to indirect purchasers, that states could do so without interfering with the federal antitrust laws. That holding does not conflict in the least with preemption when the underlying case was based solely on federal antitrust law. McShares' reliance on *Berg v. Leason*, 32 F.3d 422 (9th Cir.1994), is likewise not availing. *Berg* was a removal case and, like the other cases McShares principally relies on, was a case involving concurrent federal and state jurisdiction. *Id., see Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y. 2d 450, 461, 534 N.Y. S. 2d 152, 530 N.E. 2d 860, 865 (1988) (RICO actions are unlike federal antitrust actions as RICO claims, unlike

antitrust, do not enjoy exclusive federal jurisdiction). The *Berg* case possessed only a "tangential federal element." *Berg*, 32 F.3d at 426. The *Berg* case did not involve an analysis under Rule 11 nor preemption. *Id.*

McShares alleges that under *Berg*, the Ninth Circuit case, all Kansas trial courts need do in the malicious prosecution case is to make a determination as to whether or not the underlying federal complaint filed in the underlying antitrust action was "legally tenable." (Brief in Opposition at 15.) However, any such state determination would be a redetermination of the probable cause analysis and findings already made by the Federal District Court as exemplified in the partial summary judgment decision. *Aluminum Phosphide*, 905 F.Supp. 1457.[1]

McShares seeks to convert what should have been a straightforward analysis by the Federal District Court into a separate, expensive and extensive state court action. It is agreed that Rule 11 is not a federal common law tort of malicious prosecution but this does not permit state malicious prosecution law to determine issues that fall solely within the control of the federal court and Rule 11.

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[1] Because these issues of probable cause were decided in the underlying case, a redetermination would also be barred by collateral estoppel.

III. Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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